VOLUME FIVE
TERRORIST FINANCING

CHAPTER VII: RESOLVING THE CHALLENGES OF TERRORIST FINANCING

7.1 Introduction

Suppressing terrorism by attacking the financing efforts behind it is an uphill battle. Terrorist acts themselves may cost very little. The direct costs of the actual bombing of Air India Flight 182 that claimed 329 lives have been estimated at under $10,000, although the costs of maintaining the conspiracy that led to the bombing would have been higher. The cost of the 2004 Madrid train bombings that claimed 191 lives was estimated at €15,000, not including significant organizational costs.

Terrorist financing (TF) is also complex. There are many sources of the relatively small sums needed to finance terrorism, including open fundraising, extortion, use of charities, contributions from legitimate employment and business income, proceeds of organized crime and direct state support. There are also many hard-to-detect ways to move funds to their destination. The 9/11 Commission concluded that "…trying to starve the terrorists of money is like trying to catch one kind of fish by draining the ocean."[1]

It is impossible to obtain a clear picture of the extent of TF in Canada. In 2006-07 alone, FINTRAC disclosed to other agencies 33 cases involving $200 million of suspicious transactions that may have involved TF or other threats to the security of Canada. In addition, it disclosed eight cases involving suspicious transactions that may have involved money laundering and TF or threats to the security of Canada. The dollar value of the disclosures in these eight cases was $1.6 billion.[2] Even if only a small percentage of those suspicious transactions turned out in fact to involve TF, the dollar value would be significant.

Terrorist groups can respond quickly to efforts to suppress TF in one sector, such as financial institutions, by moving to another, such as informal value transfer systems. Revoking the registration of a charity that has been associated with TF may simply result in the organization becoming a not-for-profit body that continues to funnel funds to terrorists. Professor Martin Rudner suggested

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1 National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, p. 382, online: National Commission on Terrorist Attacks Upon the United States <http://www.9-11commission.gov/report/911Report.pdf> (accessed September 23, 2009).

2 Financial Transactions and Reports Analysis Centre of Canada, *FINTRAC 2007 Annual Report*, p. 8, online: Financial Transactions and Reports Analysis Centre of Canada <http://www.fintrac.gc.ca/publications/ar/2007/ar-eng.pdf> (accessed June 3, 2009).

that an operating assumption behind any financial intelligence strategy "… must surely be that criminal and terrorist (mis-)behavior is almost infinitely adaptable."[3]

Much of Canada's anti-TF effort is based on an anti-money laundering model that focuses on transactions of $10,000 or more. Although there is some overlap, the money laundering model is not easily transferred to TF, which often involves smaller sums and "clean" money – money not derived from the proceeds of crime. The small sums needed to finance terrorist acts are not likely to be discovered through routine collection and processing of information by FINTRAC and the CRA in compliance with their governing laws. Legislation is only one of several approaches needed to combat TF. Current and accurate intelligence about terrorists is also necessary because many transactions involving TF may not otherwise attract attention.

In dealing with TF, Canada does not make the best use of its resources. Neither FINTRAC nor the CRA are sufficiently integrated into the flow of intelligence to maximize their efforts at detecting TF. Nor can they easily provide the best financial intelligence about TF cases to CSIS and the RCMP.

In Canada, there has been only one TF conviction – the Khawaja[4] case – and that case came to light through security intelligence and police investigations, not through the anti-TF work of FINTRAC.

Deficiencies in Canada's TF regime have been identified by many external reviews, conducted both domestically and by international bodies such as the Financial Action Task Force (FATF). Such reviews serve to underline the importance of subjecting all counterterrorism activities to ongoing review of their effectiveness.

Even improved anti-TF efforts will not always succeed. It needs to be recognized that the criminals who surreptitiously gather and disburse funds to terrorists are cunning and ideologically-driven. No single effort by government can defeat them. Constant vigilance and a cooperative approach among agencies are necessary.

Initiatives to counter TF should be seen as one part of a comprehensive strategy to counter terrorism. Even if they cannot stop the flow of funds, these initiatives can produce financial intelligence that in turn can show links among terrorists – links that might otherwise not be discovered. Anti-TF measures can also produce evidence for TF prosecutions which can disrupt terrorist plans and punish terrorists well before a plot is carried out.

TF prosecutions, like terrorism prosecutions in general, will be very challenging. However, they will be more manageable with the improvements to the

3 Martin Rudner, "Using Financial Intelligence Against the Funding of Terrorism" (2006) 19(1) International Journal of Intelligence and Counterintelligence 32 at 50 [Rudner Article on Using Financial Intelligence].

4 *R. v. Khawaja*, [2008] O.J. No. 4244 (Sup. Ct.) at para. 133.

prosecution system recommended in Volume Three of this report: expert prosecutors serving under a Director of Terrorism Prosecutions and fairer and more efficient means to decide when the disclosure of intelligence is necessary for a fair trial.

7.2 Current and Potential Performance Indicators for Canada's Anti-TF Program

7.2.1 The Need for Better Mechanisms to Review Performance

"Performance" or "result" indicators facilitate assessing programs or systems.[5] However, it is not always easy to show concrete results against terrorism or TF.

There is a shortage of evidence that the anti-TF program has produced concrete results. Federal government officials stressed the difficulty of doing performance assessments about activities that involve preventing some future event or deterring crime.[6] Accurately evaluating a system to combat a covert phenomenon is invariably difficult. As Keith Morrill of DFAIT testified, "… [n]obody notices a war that is averted…."[7] Diane Lafleur of the Department of Finance made similar remarks about assessing the AML/ATF Initiative as a whole. She did, however, suggest that some performance indicators existed:

> [I]t's hard to measure what hasn't happened as a result of the actions that you've taken, but there are other indicators that you can look to; statistics, for example; [the] number of FINTRAC disclosures; [the] number of seizures by Canada Border Services Agency…prosecutions, arrests, et cetera, that eventually, I think, will be able to paint a much better picture of the success of the initiative.[8]

In his paper, Professor Nikos Passas stated that one advantage of using anti-money laundering measures for TF purposes was the acquisition of statistics and numbers that could be provided as evidence of the value of work done by the authorities:

> Some advantages of [using anti-money laundering measures for TF purposes] were also that quantitative measures of action and success could be provided: one could cite the numbers of designated suspected terrorists, accounts closed, amounts or

5 For the remainder of this chapter, these will be called "performance" indicators.
6 Testimony of Keith Morrill, vol. 54, September 28, 2007, pp. 6721-6722; Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7152-7153.
7 Testimony of Keith Morrill, vol. 54, September 28, 2007, p. 6721.
8 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6765.

assets frozen, the growing number of countries following the lead, etc.[9]

However, not all these types of statistics are collected in Canada. At best, the development of quantitative measures is a work in progress.[10] The 2008 FATF Mutual Evaluation of Canada gave a "Largely Compliant" rating for Canada's efforts to collect statistics, but the FATF also identified several areas where Canada needs to improve.[11]

More comprehensive statistics would give a better understanding of the anti-TF program and facilitate regular international and domestic assessments of its performance. As was mentioned during the Commission hearings, further information that can be used to assess performance will be collected in the work leading up to the completion of the Performance Evaluation Framework, work led by Finance Canada.

7.2.2 Number of Prosecutions or Convictions

Disrupting and preventing terrorist activities are important objectives, but the public may understandably measure "success" by the number of TF prosecutions or convictions. As of January 2009, more than seven years after the enactment of the *Anti-terrorism Act*[12] (*ATA*), there has been only one successful conviction in Canada in a case that included TF charges, although a few other prosecutions are now under way and may lead to convictions.

The current number of prosecutions and convictions in Canada does not appear to show that the anti-TF program has achieved significant success. This lack of prosecutions can be blamed only in part on the inherent challenges of TF prosecutions or on the relative infancy of the anti-TF program.[13]

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9 Dr. Nikos Passas, "Understanding Terrorism Financing," Report prepared for the Major Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 in Vol. 2 of Research Studies: Terrorism Financing Charities and Aviation Security, p. 77 [Passas Report on Terrorism Financing].

10 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6765; Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7153.

11 Financial Action Task Force, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Canada*, February 29, 2008, p. 289, online: Financial Action Task Force <http://www.fatf-gafi.org/dataoecd/5/3/40323928.pdf> (accessed January 27, 2009) [2008 FATF Mutual Evaluation of Canada].

12 S.C. 2001, c. 41.

13 In a paper prepared for the Commission, Professor Robert Chesney of Wake Forest University commented on the efficacy of TF charges. In the United States, such charges are usually pursued through charges of material support for terrorism. Chesney observed that "…even if the government has insufficient evidence to prosecute the suspect for a past act of violence or, more to the point, for an anticipated act of violence, it may yet have the option of pursuing a support charge in the spirit of preventive charging": Robert M. Chesney, "Terrorism and Criminal Prosecutions in the United States" in Vol. 3 of Research Studies: Terrorism Prosecutions, p. 91 [Chesney Paper on Terrorism and Criminal Prosecutions]. This is sometimes described as the "Al Capone" method of charging. The appendices to Chesney's paper reveal the aggressive efforts of American officials with respect to TF charges and indicate that the United States has far more experience with TF prosecutions than Canada: see Chesney Paper on Terrorism and Criminal Prosecutions, pp. 121-148.

In the one successful prosecution to date that involved TF charges – the Khawaja case – the indictment listed several terrorism-related charges, namely offences relating to the facilitation of terrorism and the preparation of explosive devices to perpetrate a terrorist attack. Khawaja was also charged with two offences related to TF. The first TF charge stemmed from instructing an individual to "… open a bank account and conduct financial transactions on [Khawaja's] behalf for the benefit of a terrorist group." The second charge related to providing, inviting a person to provide and making available property and financial services intending or knowing that they would be used for the purpose of facilitating or carrying out a terrorist activity or for the purpose of benefiting others who were facilitating or carrying out terrorist activity.[14]

In October 2008, Khawaja was found guilty of five of the original seven counts charged, including both counts that had TF elements, and not guilty on two counts (although he was found guilty of included offences with respect to those two counts). He was subsequently sentenced to ten-and-a-half years' imprisonment, in addition to the five years he had already spent in custody awaiting trial.[15]

In early 2009, another terrorism prosecution with TF elements was still underway – the "Toronto 18."[16] In both the Khawaja and "Toronto 18" prosecutions, TF charges were among others relating to terrorism. However, Canada's approach in general continues to reflect an emphasis on "chasing the bomber."

TF prosecutions can be expensive and time-consuming. Because of this, they should be used strategically to disrupt groups that pose the greatest risk. As discussed in Chapter II of Volume Three of this report, there should be mechanisms within government, including the National Security Advisor, to facilitate decisions about whether it is appropriate to refer TF matters to police or prosecutors or to use them as an ongoing source of intelligence. If a decision is made to prosecute, the Director of Terrorism Prosecutions – a new position that the Commission recommends – should facilitate the process.

In the Khawaja case, the evidence of TF was not the product of financial intelligence provided by FINTRAC or another agency.[17] Rather, it was the product of traditional intelligence and investigative techniques.

After the Commission's hearings, another RCMP investigation resulted in TF charges against an individual. The charges involved allegations of financing the Liberation Tigers of Tamil Eelam (LTTE) in Canada through the recently "listed" World Tamil Movement (WTM). This was the first Canadian prosecution based

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14 Contravening s. 83.03(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

15 The Reasons for Sentence can be found online: The Globe and Mail <http://images.theglobeandmail.com/v5/content/pdf/ReasonsforSentences0312.pdf> (accessed September 24, 2009).

16 The informal name of the case has changed several times, from the "Toronto 18" to the "Toronto 13" to the "Toronto 11," as some charges were dropped against various defendants. The term "Toronto 18" will be used here.

17 The Commission was not privy to all the facts of the Khawaja investigation. It has relied on what has been made public and on informal discussions with the lead prosecutor.

primarily on TF charges since the *Anti-terrorism Act* came into force. It would be inappropriate to comment on the merits of the case, but it is proper to note that the LTTE has been suspected for years of being one of the main actors in TF in Canada.

Federal officials stated that building strong TF cases is a lengthy process, with many dead ends and variables. Other countries appear to face similar problems. RCMP Superintendent Reynolds described TF investigations as "an extremely complex type of investigation."[18] He noted that investigations can very easily extend up to three years.[19] It takes time, he said, to put resources in place and gather intelligence once new legislation comes into force.[20] This adds to the length of investigations. He added that the disclosure requirements imposed on the Crown by the Supreme Court of Canada in *R. v. Stinchcombe*[21] often create additional hurdles and lengthen terrorism investigations. Other issues (for example, dealing with national security claims under the *Canada Evidence Act*[22]) further complicate investigations.

Mark Potter, Assistant Director for Government Relationships at FINTRAC, made a similar observation about the length of time it takes to bring a TF case to court: "…[S]o many of these investigations take a long time and, to get to the stage of a prosecution from when we provided intelligence, the investigation can take several years."[23]

In his testimony before the Commission, John Schmidt, a senior financial intelligence analyst seconded from FINTRAC to the Integrated Threat Assessment Centre (ITAC), described the complex nature of TF: "[T]he terrorist financing or resourcing trail is not like a piece of string one can follow from its beginning to its end, but more like a river system with many tributaries and outflows, many obstructions and alternative routes, many different things floating along its course…."[24]

A 2007 Court of Quebec decision involving an investigation of the alleged financing of the LTTE by the WTM demonstrates the potential complexity of TF investigations.[25] The investigation began in 2003. Search warrants issued in April 2006 led to the seizure of documents and various types of multimedia, such as CDs, DVDs and videotapes. In 2007, the RCMP asked for a court order under section 490(3) of the *Criminal Code*[26] to allow the continued detention of items seized during the investigation.

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18 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6819.
19 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6820.
20 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6819.
21 [1991] 3 S.C.R. 326. These disclosure requirements are discussed in Chapter V of Volume Three.
22 R.S.C. 1985, c. C-5. For more on the subject, see Testimony of Rick Reynolds, vol. 55, October 1, 2007, pp. 6843-6847. The *Canada Evidence Act* is discussed more extensively in Volume Three.
23 Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6998.
24 Testimony of John Schmidt, vol. 53, September 27, 2007, p. 6655.
25 *Boudreau v. World Tamil Movement* (May 31, 2007), Montreal District, 500-01-017300-044 (C.Q. (Crim & Pen. Div.)), Villemure, Q.C.J.
26 R.S.C. 1985, c. C-46.

Most of the documents seized were in Tamil. Of almost 5,000, more than 3,400 needed translation. In addition, 18 computer hard drives containing files written in Tamil were seized. The case involved 63 suspects and international transfers of funds. The investigation required forensic accountants, computer technicians and lawyers. From the time of the seizure in April 2006 to the time of the application to continue the detention of items seized, eight police officers, a civilian and an interpreter worked full time on the investigation. The judge concluded that detention of the items seized for a further year was justified. In April 2008, the case was the subject of a 184-page affidavit, another indicator of its complexity.[27]

Investigations of TF by law enforcement authorities may not always lead to TF prosecutions. They may, however, lead to the disruption of terrorist plans or activities and unearth previously unknown links among terrorists. In the end, a TF investigation may help prosecute a non-TF offence. TF investigations may also help authorities understand wider terrorist networks. It may be worthwhile to forego prosecution of minor TF players to obtain, over the long term, intelligence and evidence about more important figures. For this reason, measuring the success of anti-TF measures by looking at the number of TF prosecutions might not capture the true value of the work.

7.2.3 The Value of Intelligence Obtained

Obtaining further intelligence from a TF investigation can be an indicator of the value of anti-TF operations, although the impact of this intelligence is difficult to assess.

7.2.4 Number of Entities "Listed" under the *Criminal Code*

The various listing processes in Canada were described in Chapter II of this volume. Listing is an important component of the TF tool kit since reporting entities are required to determine whether their accounts and services involve listed entities.[28] Any transaction linked to one of the listed entities will be reported to FINTRAC as a suspicious transaction. Listed entities also become prime targets for any agency with a role in the fight against terrorism generally.

It could be argued that the increasing number of listed entities is an indication that Canada is making progress in the fight against terrorism and TF.[29] Furthermore, the listings under the *Criminal Code* – unlike the listings under UN Resolution 1267[30] – are made using a Canadian process.

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27 Affidavit of Shirley Davermann, April 1, 2008.

28 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 83.08-83.12.

29 Since each listing is revised at regular intervals, this should weed out any entities that are no longer involved in terrorism. Any increase in the number of entities listed would therefore not be due to entities remaining on the list after their terrorist activities have ceased.

30 The listing process is explained in section 2.4.

7.2.5 Number and Monetary Value of Frozen Accounts

The value of funds held in frozen bank accounts belonging to listed entities changes over time, since funds may be forfeited or released. A total of $186,335 was held frozen in 10 accounts in Canadian financial institutions as of November 2006.[31] As of April 2008, $69,625 was held frozen in nine accounts.[32] These numbers simply show the total funds that may belong to a listed entity, held by Canadian financial institutions at a given time. There is nothing to indicate what portion of those funds, if any, was linked to terrorism.

7.2.6 FINTRAC Performance Indicators

FINTRAC's performance was a prominent topic before the Commission. In many ways, FINTRAC is the centerpiece of the Canada's anti-TF program. For this reason, FINTRAC receives a large portion of the resources available for this purpose. However, FINTRAC's effectiveness has often been questioned. There has been little evidence of value in FINTRAC's contribution to TF investigations, prosecutions or convictions. In addressing privacy concerns relating to FINTRAC operations, the Office of the Privacy Commissioner of Canada criticized FINTRAC for failing to demonstrate results:

> [T]he Centre has compiled a detailed database on individual Canadians and their finances, maintaining these records for a decade or more in some cases. And from this regime has come little discernable benefit.[33]

That is not to say that FINTRAC is not doing its work as it should. Existing performance evaluation mechanisms simply may not yet fully capture the value of FINTRAC's work. Furthermore, concrete results in complex financial investigations could be long in coming and so may not reflect the true value in the short term.

FINTRAC publishes an annual report, a performance report and a report on plans and priorities each year.[34] FINTRAC officials argued that several performance indicators are already available. As a starting point, according to Mark Potter of FINTRAC, the number of its disclosures can be considered an indication of value.[35] These numbers are its most commonly mentioned indicators in media reports and are featured in annual reports. However, questions remain about

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31 Final Submissions of the Attorney General of Canada, Vol. III, February 29, 2008, para. 165.

32 Exhibit P-443: Summary of Meeting between Commission Counsel and Department of Finance, April 10, 2008, p. 5.

33 Exhibit P-278, Tab 5: Office of the Privacy Commissioner of Canada, Submission in Response to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, "Canada's Financial Monitoring Regime," September 2007, p. 2 [OPC Submission on Canada's Financial Monitoring Regime]. A senior official of the OPC stated that this opinion may change once the OPC completes its audit of FINTRAC: see Testimony of Carman Baggaley, vol. 71, November 6, 2007, p. 9095.

34 Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6972.

35 Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6951.

what those numbers prove. In the 2005-06 reporting period, for example, FINTRAC made disclosures of suspected TF and other threats to the security of Canada valued at $256 million, but how much, if any, of that amount was related to TF is not clear.[36] One RCMP official questioned the $256 million figure in his testimony:

> I can only comment from the perspective of the RCMP and our investigation and we don't – we can't see that – we're not seeing that level of funding that we can attribute to terrorist financing. So I don't know how [FINTRAC is] attributing that.[37]

Decreases in the dollar value of disclosures in a given year may be because (i) the program is working, (ii) TF cases are more difficult to identify or (iii) FINTRAC is not effective. It is difficult to view the dollar value of disclosures as a performance indicator.

Professor Anita Anand criticized the use of the number of disclosures as a performance indicator: "…I think there's a gap in the legal regime at that very point that if FINTRAC is reporting a suspicious activity and that is supposed to be evidence of its efficacy, in my mind that is insufficient for us to draw that conclusion."[38]

Potter stated that the fact that FINTRAC had received 15 million financial transaction reports during the 2005-06 fiscal year (the number rose to 21.6 million for the 2007-08 fiscal year[39]) showed that the deterrence aspect of its work was effective.[40] However, the Office of the Privacy Commissioner of Canada suggested that entities might simply "over-report" to ensure compliance with reporting requirements and to avoid penalties for failing to report.[41]

As Professor Anand suggested in her paper for the Commission, a cost-benefit analysis is needed, especially since much of the cost of FINTRAC's reporting requirements are borne by private sector reporting entities.[42]

The routine collection of transaction reports should continue, as required by the *Proceeds of Crime (Money laundering) and Terrorist Financing Act*[43] (*PCMLTFA*),

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36 Financial Transactions and Reports Analysis Centre of Canada, *FINTRAC 2006 Annual Report*, p. 8, online: Financial Transactions and Reports Analysis Centre of Canada <http://www.fintrac.gc.ca/publications/ar/2006/ar-eng.pdf> (accessed June 3, 2009).

37 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6868.

38 Testimony of Anita Anand, vol. 85, November 29, 2007, p. 10936.

39 Financial Transactions and Reports Analysis Centre of Canada, *FINTRAC 2008 Annual Report,* p. 16, online: Financial Transactions and Reports Analysis Centre of Canada <http://www.fintrac.gc.ca/publications/ar/2008/ar-eng.pdf> (accessed February 24, 2009).

40 Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6952

41 OPC Submission on Canada's Financial Monitoring Regime, p. 4.

42 Anita Indira Anand, "An Assessment of the Legal Regime Governing the Financing of Terrorist Activities in Canada" in Vol. 2 of Research Studies: Terrorism Financing Charities and Aviation Security [Anand Paper on Legal Regime Governing Terrorist Financing].

43 S.C. 2007, c. 17.

but the focus of performance measures should shift to end results such as prosecutions and the distribution of valuable intelligence to other agencies. FINTRAC's performance should not be measured mainly by how many transaction reports it receives.

7.3 Lack of Adequate Performance Indicators and Assessment Mechanisms Generally

Most, if not all, current performance assessments do not show whether Canada is winning or losing the fight against TF. It may simply be that appropriate data is not available or is not being used to assess Canada's performance.

The lack of relevant statistics to help measure Canada's performance in TF matters is not a recent problem. Others noted the deficiency even before the Commission began its investigation of TF. The Auditor General of Canada made the following observation in 2004:

> The Treasury Board requires that departments and agencies measure program performance, relate it to program objectives, and report on results achieved. Indicators by which to measure performance are to go beyond activities and outputs to outcomes. Weighed against these requirements, the information on the [AML/ATF] Initiative that has been collected and reported to date is limited.[44]

It would help evaluations of the anti-TF program if federal agencies were required to compile statistics about the program's workings.

Diane Lafleur of the Department of Finance stated that Canada has "…been working diligently in the wake of recommendations from the Auditor General, among others, to develop a better performance framework for the [AML/ATF] initiative, and that is ongoing work right now."[45] The federal government now has a plan to prepare future assessments of the AML/ATF Initiative. The Department

44 *Report of the Auditor General of Canada to the House of Commons*, November 2004, Chapter 2: "Implementation of the National Initiative to Combat Money Laundering," para. 2.86, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/docs/20041102ce.pdf> (accessed January 24, 2009) [2004 Auditor General Report on Money Laundering]. This lead to the recommendation, in para. 2.92, that: "The government should establish effective mechanisms for monitoring the results of disclosures, including the extent to which disclosures are used and the impact they have on the investigation and prosecution of money-laundering and terrorist-financing offences. It should report summary information on these results to Parliament regularly."

45 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6765. See also Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6951, where he said that "…there are certainly efforts under way to strengthen results management, to strengthen the evaluation framework for the regime, so that all partners involved in combating money laundering and terrorist financing are able to provide information that contributes to a better way of measuring our overall results, which is getting at the very end point of how many people are convicted."

of Finance has retained an external consulting firm to prepare a performance evaluation framework.[46] The framework has several objectives:

- Describe the objectives, activities, outputs and expected outcomes of the Regime;
- Summarize the roles and responsibilities of each of the partner departments and agencies;
- Identify the principal evaluation issues that should be addressed during the full evaluation of the Regime; and
- Identify the performance indicators for each of these issues and assess data requirements to support analysis of these indicators, including responsibility for collecting the data and frequency.[47]

The continuing lack of a viable performance evaluation program is not acceptable. The framework described above should facilitate future assessments of the Initiative. Review of the effectiveness of all anti-TF measures should be ongoing.

The framework document being prepared should be implemented as quickly as possible, and should be made public except where national security or operational interests forbid. Such a framework should be nuanced enough to avoid focusing simply on qualitative measures, and should assess how well the anti-TF program supports Canada's overall anti-terrorism strategy.

7.4 Challenges Relating to FINTRAC

7.4.1 Privacy

FINTRAC collects significant personal information about individuals who carry out financial transactions. It keeps that information for up to 15 years, depending on the nature of the information.[48]

In Canada, privacy considerations play a major role in shaping policies and laws on TF. Mark Potter of FINTRAC testified that privacy considerations appear to have been accorded greater weight in Canada than in some other countries.[49] Satisfying privacy concerns in light of the needs of the anti-TF program, the complex nature of TF and Canada's international TF obligations, presents significant challenges.

The Office of the Privacy Commissioner of Canada described its concerns about intrusiveness of the main legislative tool of the anti-TF program, the *PCMLTFA*:

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46 The document was shown to Commission Counsel. At the request of Department of Finance officials, the document has not been made public.

47 Exhibit P-439: Department of Finance Response to Supplementary Questions of the Commission, Question 2 [Department of Finance Response to Supplementary Questions of the Commission].

48 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, ss. 54(d), (e) [*PCMLTFA*].

49 Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6967.

> [T]he *PCMLTFA* regime has created a mandatory reporting scheme allowing government to access personal information for investigatory purposes *without* judicial authorization and *without* satisfying the standard requirement of reasonable and probable grounds but with sharp penalties for organizations and individuals who fail to report. As Stanley Cohen (General Counsel, Department of Justice) remarked before a Senate Committee reviewing C-25, such a *mandatory* reporting of suspicious transactions tests the limits of constitutional authority in Canada.[50]

The Office of the Privacy Commissioner also raised concerns about the expansion of the reporting program – the increase in the range of private sector entities required to report to FINTRAC – that Bill C-25[51] introduced into the *PCMLTFA*.[52]

Mark Potter of FINTRAC testified that the limits contained in the *Charter* and privacy laws were "simply the reality in Canada." Furthermore, he said, the changes introduced by Bill C-25 responded to law enforcement's desire for more information from FINTRAC while still "...maintaining that balance of *Charter* and privacy rights in what we are allowed to provide."[53]

The federal government appears to have gone a considerable way towards addressing privacy concerns in legislation dealing with TF. FINTRAC cannot divulge certain information to private sector reporting entities. In addition, FINTRAC cannot compel private sector entities to provide information about a specific transaction that has been identified to FINTRAC in a Voluntary Information Record (VIR) – for example, a VIR from the RCMP. This should satisfy some *Charter* privacy concerns about unreasonable search or seizure.

The government appears to have understood the specific privacy considerations attached to the information that comes under the purview of FINTRAC. In addition, Bill C-25 has added another review mechanism for the AML/ATF Initiative – the Privacy Commissioner of Canada. Every two years, the Privacy Commissioner must "…review the measures taken by [FINTRAC] to protect information it receives or collects" under the *PCMLTFA*.[54] The review will focus on the privacy measures and how personal information is protected and handled by FINTRAC. It will not consider the substantive work and mandate of FINTRAC. The Privacy Commissioner, Jennifer Stoddart, testified that her Office would not have an oversight role: "We're simply going to be looking at…[FINTRAC's] information handling procedures and processes through our audit."[55]

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50 OPC Submission on Canada's Financial Monitoring Regime, pp. 4-5, 7.
51 *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* [Bill C-25].
52 OPC Submission on Canada's Financial Monitoring Regime, pp. 2-4.
53 Testimony of Mark Potter, vol. 56, October 2, 2007, pp. 6966-6967.
54 *PCMLTFA*, s. 72(2).
55 Testimony of Jennifer Stoddart, vol. 72, November 6, 2007, p. 9006.

Reviews of the effectiveness of FINTRAC should occur alongside privacy audits. Effectiveness is not entirely divorced from privacy considerations because privacy intrusions are more easily justified if shown to be effective in preventing TF and acts of terrorism.

FINTRAC is described in the *PCMLTFA* as an independent agency that "…acts at arm's length from law enforcement agencies and other entities to which it is authorized to disclose information." [56] It was positioned this way because reporting entities must report a broad range of financial transactions to FINTRAC. The drafters of the *PCMLTFA* thought that it would constitute an unacceptable privacy intrusion to allow FINTRAC freely to give information about an individual's financial transactions, or even an analysis based on that information, to law enforcement. Privacy concerns also explain in part why the O'Connor Commission recommended that FINTRAC be subject to review by the Security Intelligence Review Committee (SIRC).

The 2008 FATF Mutual Evaluation of Canada described the justification offered for the arm's-length relationship:

> The decision to provide police and other recipients with designated information only when FINTRAC reaches its threshold, rather than to provide unrestricted access to FINTRAC's data holdings, reflects the fact that FINTRAC receives a large amount of varied financial information on persons and entities, the vast majority of which is legitimate and not relevant to any investigation or prosecution.[57]

Janet DiFrancesco, Assistant Director for Macro-Analysis and Integration within the Operations Sector at FINTRAC, testified that being at arm's length from other bodies is an advantage:

> [O]ur regime is -- was created to be consistent with the Charter of Rights, and it does of course consider privacy laws but I think one of the advantages that FINTRAC does have, having been created at arm's length, is that we are also able to collect what we call more objective reports, prescribed transactions in terms of international wire transfers and large cash transaction reports.[58]

It has been suggested that FINTRAC's arm's-length relationship with other agencies is necessary to ensure compliance with the right to protection against

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56 *PCMLTFA*, s. 40(a).
57 2008 FATF Mutual Evaluation of Canada, para. 382.
58 Testimony of Janet DiFrancesco, vol. 56, October 2, 2007, pp. 6967-6968.

unreasonable search or seizure guaranteed by section 8 of the *Charter*.[59] Both TF and money laundering laws might be challenged as violating Charter rights; in the absence of any judicial guidance, this remains an open question dependent on the circumstances and on the exceptions in the *Charter*.

The "arm's-length" concept originated in money laundering and does not necessarily fit with the state's more compelling interests with respect to TF. Although the arms-length arrangement is designed to ensure that the FINTRAC system respects privacy values and does not allow law enforcement or security intelligence agencies unimpeded access to the vast amount of financial information that FINTRAC has collected without warrant, the arrangement has disadvantages.

The most significant disadvantage is that the arm's-length concept could encourage FINTRAC to operate in its own silo. FINTRAC might be reluctant to pull information into it, and other agencies might be reluctant to give information to FINTRAC. Instead, CSIS, the RCMP, CBSA, CSE and other agencies should all be encouraged to share information with FINTRAC, and FINTRAC should actively seek intelligence from these agencies to help guide its work.

As well, the arm's-length metaphor is misleading to the extent that it suggests that FINTRAC cannot receive or even provide information to law enforcement and security intelligence agencies. The *PCMLTA* does not prevent FINTRAC from receiving information from the RCMP, CSIS and other agencies, and Bill C-25 has significantly expanded the range of information that FINTRAC can disclose to other agencies.

The arm's-length relationship between FINTRAC and the recipients of its disclosures should be re-examined in light of the need for more extensive sharing of information among agencies in TF matters.

Even if moving away from an arm's-length relationship did violate the *Charter* provision against unreasonable search or seizure in section 8, there may be sufficient flexibility in section 1 of the Charter to justify such an infringement. The Supreme Court of Canada concluded in *Hunter v. Southam*[60] that a lower standard could be justified to authorize searches in the national security context than in ordinary criminal cases. This possibility has largely been left unexplored. Courts might rely on *Hunter v. Southam* to accept lower standards for searches dealing with TF than with money laundering. A national security justification, coupled with the need to meet Canada's international commitments with respect to TF, makes the government's case for justifying limits on privacy and other Charter rights much stronger in TF matters than in the money laundering context. As a result, more extensive information-sharing arrangements may be constitutionally acceptable in terrorism and TF matters than in "ordinary" criminal money laundering cases.

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59 Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham: LexisNexis, 2005), pp. 266-272.

60 *Hunter v. Southam*, [1984] 2 S.C.R. 145.

7.4.2 The Critical Importance of Voluntary Information Records in FINTRAC's Terrorist Financing Work

The smaller amounts that are typically involved in TF cases than in money laundering cases impede attempts by FINTRAC to generate TF leads on its own. Fortunately, FINTRAC is empowered to receive information volunteered by anyone. As noted in Chapter III, the RCMP, CSIS, CSE, ITAC, CBSA, CRA, DFAIT and other agencies can voluntarily provide information to FINTRAC by way of a form entitled a Voluntary Information Record (VIR). Foreign FIUs and individuals can also volunteer information,[61] although they would not use a VIR to do so. Private sector reporting entities provide Suspicious Transaction Reports (STRs) to FINTRAC, in addition to reports about transactions that exceed a given monetary threshold.

The VIR process is vital to the success of FINTRAC's work on TF. As noted in Chapter III, about 90 per cent[62] of the possible TF cases that come to FINTRAC's attention do so because FINTRAC has received law enforcement or CSIS VIRs. This illustrates the importance of shared intelligence to help identify targets. It is not surprising that VIRs from CSIS or the RCMP are better at identifying targets than the millions of transaction reports that financial institutions routinely make to FINTRAC each year.

Once FINTRAC receives a VIR, its TF Unit determines whether it can produce an analysis for the submitting agency. FINTRAC should also, in appropriate cases, provide that same analysis to other relevant agencies, a step that at present can be inhibited by caveats attached by the agency submitting the VIR. Where appropriate, FINTRAC should seek exceptions to the caveats to allow further dissemination of the intelligence that the originating agency provided.

There are limits to the effectiveness of transaction reports. The solution is not always to add inflexible financial controls that may adversely affect legitimate activities and impose substantial costs on private sector partners. The key is to take an approach to sharing information and identifying targets flexible enough to respond to the ways that terrorists adapt to changing regulations. As Professor Passas stressed, "…[w]e have to clearly identify our main problems and targets, collect and analyze critically the evidence on their modus operandi, motives, aims, financing and support, and then focus on carefully planned and consistently applied policies that are instrumental to our goals and minimize the externalities and adverse effects."[63] Furthermore, "…the objectives and functions of financial controls must be well understood, and particularly the point that

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61 *PCMLTFA* s. 54(a). CSIS provides more VIRs to FINTRAC than any other agency.

62 Testimony of Janet DiFrancesco, vol. 56, October 2, 2007 at p. 6956. Mark Potter could not give a number for the operations of FIUs in other countries: see Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6965.

63 Passas Report on Terrorism Financing, p. 106.

intelligence gathering and investigative leads are the key goals, rather than 'drying up' the financial resources of terrorism, which is an impossible task."[64]

As noted in Chapter III, FINTRAC had rarely identified cases on its own in recent years,[65] yet the FATF criticized FINTRAC for excessive reliance on voluntary reports.[66] The Commission does not share FATF's negative view of FINTRAC's reliance on leads and intelligence provided by other agencies. Such reliance is consistent with an approach that uses intelligence to help identify targets. The amounts of money at issue in TF, typically smaller than in money laundering cases, make it difficult for FINTRAC to generate leads on its own. This is further demonstration of the limits of using the money laundering model for TF matters.

7.4.3 Limits on FINTRAC's Disclosures of Designated Information

As discussed in greater detail in Chapter III, even after the Bill C-25 amendments, some limits remain on the information that FINTRAC can disclose to agencies such as the RCMP and CSIS. If an agency wants information beyond "designated information" – for example, FINTRAC's own analysis that led to its decision to disclose – a production order from a judge is required. The 2008 FATF Mutual Evaluation of Canada stated that 14 production orders had been sought to that point by law enforcement. It is not known whether any of these orders related to TF. The main point is the relatively small number of orders. The FATF Mutual Evaluation identified two possible explanations for this:

> Law enforcement authorities cite two basic reasons for the reluctance to apply for production orders. One is that the legislative threshold is high, the same as for a search warrant: the applicant must satisfy the court that there are "reasonable grounds to believe" an offence has been committed. A search warrant is preferable because it provides direct access to target information that could be used as evidence. Second, the information contained in [a] FINTRAC disclosure is generally considered below the legislative threshold [of evidence] that a production order requires.[67]

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64 Passas Report on Terrorism Financing, p. 90. Passas also states at p. 79 that there are risks that inadequate or ill-thought CFT measures may: drive networks and transactions underground, losing the opportunity to monitor, prevent, better understand and design long-term strategies; cause collateral damage and unnecessary economic disruptions; alienate ethnic groups; undermine our own legitimacy; induce superficial (paper) compliance by various countries or agencies, thereby having an ineffective international CFT regime (i.e. rules and laws may be in place, but they are of little use if they go un-enforced); neglect of more serious problems (regarding terrorist financial vulnerabilities or other serious crimes); produce more grievances and provide more fertile ground for the recruitment of new militants. Moreover, if the root causes of terrorism are ignored, the problems the international community faces will remain in place despite apparent successes: that is, even if designated individuals or groups are arrested or killed in action, other groups or secular radicalism may follow.

65 Testimony of Jim Galt, vol. 55, October 1, 2007, p. 6920.

66 2008 FATF Mutual Evaluation of Canada, para. 21.

67 2008 FATF Mutual Evaluation of Canada, para. 387.

The lack of authority in the *PCMLTFA* for FINTRAC to disclose information beyond designated information, including its own analysis of the basic financial data, is a significant deficiency. If FINTRAC's analysis were automatically included in its disclosures of designated information, recipients could make better and more timely use of the disclosure, and the links between FINTRAC and its counterterrorism partners would be strengthened.

One solution could be to amend the *PCMLTFA* to require FINTRAC to include its analysis in disclosures if it had "reasonable grounds to *believe*," for example, that information would be relevant to investigating or prosecuting a TF offence, a more stringent precondition than "reasonable grounds to *suspect*." A "reasonable grounds to believe" provision would result in a less serious privacy intrusion. Any privacy concerns that remained could be somewhat allayed by limiting the requirement to disclose to TF cases. It should be easier under the *Charter* to justify infringements of privacy to counter terrorism than to counter money laundering.[68]

7.4.4 FINTRAC Priorities

FINTRAC gives priority to possible TF cases regardless of the size of the operation.[69] However, there may be cases where money laundering increases the wealth and power of criminal organizations, in turn facilitating violent activities that could rival the violence associated with terrorism. For this reason, FINTRAC should not automatically give priority to TF investigations, although it may normally be appropriate to do so. In some cases, FINTRAC may want to consult with the RCMP and CSIS in deciding its priorities.

7.4.5 Adding New Reporting Sectors

Under the *PCMLTFA*, reporting entities must report certain financial transactions to FINTRAC. These entities include federally-regulated banks, provincially-regulated caisses populaires and credit unions, money services businesses and securities dealers. The *PCMLTFA* also makes it possible to add other types of entities or individuals to the list of reporting entities.

Although FINTRAC monitors various sectors to determine if they should be added as reporting entities, Canada was reprimanded in the 2008 FATF Mutual Evaluation of Canada for not following appropriate risk-management techniques in this regard.[70] The ability to add new financial sectors is important since those who finance terrorism seem able to adjust their behaviour to avoid dealing with entities that are obliged to report. Ideally, FINTRAC should be able to obtain financial transaction reports from all sectors that can be used for TF.

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68 *Hunter v. Southam* [1984] 2 S.C.R. 145; *Re Section 83.28 of the Criminal Code* [2004] 2 S.C.R.

69 Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6962; Exhibit P-440: FINTRAC Response to Supplementary Questions of the Commission, February 5, 2008, Question 2(m)(i) [Second FINTRAC Response to Supplementary Questions of the Commission].

70 2008 FATF Mutual Evaluation of Canada, paras. 630-640.

7.4.6. The Need for FINTRAC to Provide Better Information and Training to Private Sector Reporting Entities

Private sector reporting entities are essential partners in FINTRAC's work to detect and deter TF. The reporting entities provide, at their own expense, most of the information and data which FINTRAC receives.[71] Suspicious Transaction Reports (STRs) from reporting entities play an important role in alerting FINTRAC to possible TF. These STRs, like the VIRs supplied by government agencies, show the value of shared intelligence in identifying targets for further examination by FINTRAC, as opposed to reliance on the automatic reporting of certain prescribed transactions, such as those of $10,000 or more, or those involving listed terrorist individuals or organizations.

The preparation of STRs that are useful depends on the ability of private sector reporting entities to identify what is suspicious. However, FINTRAC perhaps has not done a good job of communicating to reporting entities the distinction between TF and money laundering, and some reporting entities do not see TF as a priority.[72] FINTRAC should make every effort to help reporting entities identify transactions that may involve TF.[73] Better education on TF issues should lead to better and more frequent STRs about TF from private sector entities.

FINTRAC and other authorities should also supply reporting entities with current and user-friendly lists of terrorist entities and other relevant information, even if terrorists will not likely often conduct financial transactions using listed names.

CSIS and the RCMP could also assist in the training of reporting entities on TF issues. They could provide feedback to the entities about the importance of the information they supply to FINTRAC, something that FINTRAC does not at present do.

7.5 The Legal Profession

Members of the legal profession have been identified by the FATF as possible conduits for TF or money laundering. The "40 Recommendations" of the FATF on money laundering explain that jurisdictions are responsible for ensuring that the legal profession is covered by anti-TF measures.[74] The "Interpretative Notes to the 40 Recommendations of the FATF" also state that each jurisdiction must determine the extent of legal professional privilege, and that lawyers might be

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71 *PCMLTFA*, s. 54.

72 Exhibit P-241, Tab 2: Deloitte, Report of Findings as a Result of the Interviews of Regulated Entities on the Topic of Terrorist Financing In, Through and Out of Canada, September 28, 2007, paras. 5.1.4, 5.1.12.

73 This could be done using a three-pronged approach: adding more information on the listings page about each organization's suspected means of TF; creating an open-source database, possibly to be maintained by an academic institution with funding by government; and providing more extensive information about specific groups, if that information is available.

74 Recommendations 12 and 16, online: Financial Action Task Force <http://www.fatf-gafi.org/document/28/0,3343,en_32250379_3226930_33658140_1_1_1_1,00.html> (accessed January 24, 2009).

allowed to send STRs to their regulatory bodies instead of to their country's FIU if there is appropriate cooperation between the two bodies.[75]

In November 2001, regulations made under the predecessor to the *PCMLTFA* came into force. The regulations would have required lawyers to report suspicious transactions. The Law Society of British Columbia and the Federation of Law Societies of Canada successfully challenged this obligation.[76] In granting a temporary exemption, Justice Allan of the Supreme Court of British Columbia spoke of the regulation's damage to the solicitor-client relationship:

> The proclamation of s. 5 of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court. The petitioners seek a temporary exemption from the legislation until the merits of their constitutional challenge can be determined. I conclude that the petitioners … are entitled to an order that legal counsel are exempt from the application of s. 5 of the Regulations pending a full hearing of the Petitions on their merits.[77]

Following this interlocutory decision, the federal government and the Federation of Law Societies of Canada agreed that the matter would be adjourned indefinitely if the government agreed, which it did, not to require lawyers to report to FINTRAC without the Federation's consent. If, however, a future government required lawyers to report, the case could go to a full hearing.

In 2005, then FINTRAC Director Horst Intscher stated that, "I would be happier if there were some reporting requirement for lawyers because, at present, the reporting we get is not by them but about them by other financial institutions."[78]

Solicitor-client privilege was addressed during both Senate and House of Commons committee reviews of the *Anti-terrorism Act*. However, both reviews primarily discussed the *Criminal Code* offence of not reporting terrorist property, rather than the proposed reporting obligations of lawyers under the *PCMLTFA*. The Commons and Senate committees reached opposite conclusions. The

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75 Interpretative Note to Recommendation 16, online: Financial Action Task Force <http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236920_33988956_1_1_1_1,00.html#Interpretative_Note_to_r_16> (accessed January 24, 2009).

76 2004 Auditor General Report on Money Laundering, para. 2.30; *The Law Society of B.C. v. A.G. Canada*, 2001 BCSC 1593. Mark Potter testified that at the time the *Anti-terrorism Act* was drafted in 2001, Canada recognized the possibility that lawyers could become involved in money laundering and TF, and included the legal profession in the category of entities which were required to file reports with FINTRAC: Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6976.

77 2001 BCSC 1593 at para. 108.

78 The Senate of Canada, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, February 2007, p. 57, online: Parliament of Canada <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/anti-e/rep-e/rep02feb07-e.pdf> (accessed February 17, 2009) [Senate Report on the *ATA*].

Commons Committee recommended a limited exemption for the legal profession from reporting requirements under the *Criminal Code*. The Senate Committee concluded that lawyers should be subject to the reporting requirements under the *Criminal Code*, arguing that the reporting scheme sufficiently protected solicitor-client privilege.

The Senate Committee report called for the government to continue its current dialogue with the legal community on the subject of reporting requirements under the *PCMLTFA*.[79] The preceding year, another Senate committee, the Standing Senate Committee on Banking, Trade and Commerce, recommended that the federal government complete negotiations with the Federation of Law Societies regarding the client-identification, record-keeping and reporting requirements imposed on solicitors under the *PCMLTFA*. The Committee called for the requirements to respect solicitor-client privilege, the *Charter* and the *Quebec Charter of Human Rights and Freedoms*.[80]

In December 2008, provisions of a regulation made under the *PCMLTFA* came into force, subjecting the legal profession to client identification, verification, record-keeping and compliance obligations, although it did not impose any reporting obligations in the normal course of providing legal services.

In its 2008 Mutual Legal Evaluation of Canada, the FATF criticized Canada because its reporting requirements did not extend to the legal profession.[81] However, the regulation governing lawyers was not then in force. It is not clear whether FATF will see this new regulation as satisfying its concerns when it comes into force. The regulation deals primarily with identification, verification and record-keeping, not with reporting, but should help identify when particular targets of an investigation have dealings with lawyers.

The concern over imposing reporting obligations on the legal profession is driven by the legitimate need to respect solicitor-client privilege – an important, but not absolute principle.[82] However, excluding certain sectors from the obligation to report suspicious transactions has the potential to weaken the entire reporting component of the anti-TF program.

This is a live issue. Other organizations have looked at this question, and their analyses should be taken into account when assessing the appropriate

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79 Senate Report on the *ATA*, p. 57.

80 Senate of Canada, Interim Report of the Standing Senate Committee on Banking, Trade and Commerce, *Stemming the Flow of Illicit Money: A Priority for Canada, Parliamentary Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, October 2006, p. 14, online: Parliament of Canada <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/bank-e/rep-e/rep09oct06-e.pdf> (accessed January 16, 2009).

81 2008 FATF Mutual Evaluation of Canada, para. 1235. In fact, Canada received a Non-Compliant rating on Recommendation 12 because several sectors were not covered, including the legal profession. Several of these deficiencies were remedied by Bill C-25. On the subject of the legal profession, the FATF mentioned that: "The participation of lawyers in the AML/CFT effort is essential since their current exemption leaves a very significant gap in coverage."

82 *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445.

obligations of lawyers in combatting money laundering and TF. Lawyers, of course, should not be immune from legitimate TF investigations, especially if a reasonable suspicion exists of their involvement in TF. In addition, regulations relating to the obligations of lawyers to engage in client identification should be carefully monitored to address solicitor-client privilege issues and to ensure that there are no inappropriate gaps in their obligations under the *PCMLTFA* that could weaken the anti-TF program.

7.6 Review of FINTRAC and the Role of the Prime Minister's National Security Advisor

Greater attention should be paid to the process by which FINTRAC's work is reviewed. The Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar recommended that the jurisdiction of SIRC be expanded to include review of FINTRAC. As discussed in Chapter IV, the O'Connor Commission's recommendations were aimed mainly at reviewing FINTRAC's work to ensure that it was proper and lawful and that it respected privacy values. This type of review is valuable and can help promote public confidence, but it should be distinguished from a review of the efficacy or effectiveness of FINTRAC's work. Indeed, Justice O'Connor drew this important distinction and was clear that his focus was on propriety.[83] That focus was understandable given the events that led to his Inquiry. This Commission's focus on the effectiveness of Canada's anti-terrorism efforts is also understandable, given that the bombing of Air India Flight 182 led to the current Inquiry.

In her paper for the Commission, Professor Anand argued that "…no body undertakes an assessment of the efficacy of the existing [TF] regime. Indeed, in the absence of such an assessment mechanism, there appears to be an assumption that the regime is effective."[84] She continued that "…it appears that SIRC may not be the appropriate body to perform this oversight role."[85] She also stressed that proper evaluation cannot be done simply by examining FINTRAC on its own. Other agencies, such as the RCMP and CSIS, needed to be examined as well.[86]

Enhancing the role of the National Security Advisor (NSA), as recommended in Chapter II of Volume Three of the Commission's report, would help the NSA evaluate how well FINTRAC works with other agencies such as CSIS, the RCMP, CBSA, CRA and CSE.

Among the Commission's recommended new responsibilities for the NSA would be working on problems associated with the distribution of intelligence, helping resolve issues related to the exchange of information among agencies

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83 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), pp. 523-524.

84 Anand Paper on Legal Regime Governing Terrorist Financing, p. 148.

85 Anand Paper on Legal Regime Governing Terrorist Financing, p. 149.

86 Anand Paper on Legal Regime Governing Terrorist Financing, p. 151.

and providing feedback about the utility of information shared. The NSA could play a role in ensuring that intelligence agencies provide FINTRAC and the CRA with relevant information. The NSA could work on coordination issues made more difficult by the fact that not all agencies involved in TF matters (such as FINTRAC on the one hand and CSIS, the RCMP and CBSA on the other) are within the same minister's portfolio.[87]

The success of initiatives against TF will depend on the appropriate sharing of intelligence and on cooperation among multiple agencies. An NSA with enhanced responsibilities would be well-positioned to ensure appropriate coordination and review of TF efforts. Just as the NSA would have to respect police and prosecutorial independence, the NSA would have to respect statutory restrictions imposed on FINTRAC and the CRA about the information that they are permitted to distribute.

The NSA would be able to evaluate the work of the agencies in a confidential setting that would not risk security breaches. The fact that the NSA reports to the Prime Minister should make certain that the NSA has the necessary power to ensure that agencies operate effectively as part of the overall system to counter TF and terrorism.

7.7 Resources for TF Investigations

Previous chapters of this volume describing the roles of various agencies also discussed resources. The 2008 FATF Mutual Evaluation of Canada concluded that "…[o]verall, authorities seem to be well-equipped, staffed, resourced and trained,"[88] but representatives of some agencies testified about inadequate funding. The federal government appears to have resolved some of these concerns, but should continue to monitor the adequacy of resources closely.

As noted during the hearings, the term "resources" means more than money. Just as important, the term refers to the capacity to recruit and retain qualified individuals. One submission to the Commission suggested that the federal government should "…[r]eview for adequacy, the levels of financial and human resources across all government agencies responsible for combating terrorism financing, and where appropriate, increase financial and human resources."[89]

One way to enhance the quality of work of those involved in the anti-TF program would be to share training across agencies and to take steps to cut duplication of services within the agencies dealing with TF. For example, one agency could take the lead in training and make it available to other agencies. This would make efficient use of limited training funds. Training across several agencies might also help break down organizational barriers and build inter-agency linkages

87 Testimony of Tyson George, vol. 56, October 2, 2007, p. 7072.

88 2008 FATF Mutual Evaluation of Canada, para. 53. The FATF did mention that FINTRAC lacks sufficient resources for analysis.

89 *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. 160 [AIVFA Final Written Submission].

that could pay important dividends later. Joint training would also complement the enhanced use of secondments among agencies.

In some cases, it may be possible to avoid duplication of services among agencies – for example, in collecting open source material about common TF issues. Avoiding duplication might not only save resources, but may promote increased daily cooperation and exchange of information among the agencies.

7.8 Charities and Not-for-profit Organizations

As explained in detail in Chapter VI, charities and not-for-profit organizations (NPOs) can be among the many vehicles used for raising and moving funds for terrorism. Although much concern has been expressed about the use of these organizations – particularly registered charities – it is important to remember that charitable status is not necessarily important to those committed to raising and moving funds. Many terrorist acts cost so little to carry out that setting up a charity to raise funds is not necessary. Those committed to financing terrorism are not likely to be deterred from providing funds simply because the recipient cannot issue tax receipts to them. Furthermore, the process of obtaining and maintaining charitable status involves being monitored by the Charities Directorate – additional attention that those interested in financing terrorism certainly do not want.

That said, there are other reasons for groups that want to finance terrorism to seek charitable or not-for-profit status. Many of these reasons were identified in Chapter VI. They include the frequently cash-intensive nature of transactions involving such organizations, making it more difficult for the authorities to identify TF, and the ability of such organizations to transfer funds to other countries with relative ease.

Federal and provincial governments must recognize their shared responsibility for the regulation of charities. Constitutional obstacles preclude a regulated system similar to that of the England and Wales Charity Commission. The ideal would be federal-provincial agreements on the monitoring and regulation of charities. If there is no agreement, federal and provincial governments must individually assume their responsibilities to deal with the possible use of charities for TF. For example, the federal government could examine which parts of the UK Charities Commission model could be implemented without provincial involvement.

The following several sections provide specific suggestions and recommendations to reduce the likelihood that charities and NPOs will be used to finance terrorism.

7.8.1 Sharing Intelligence

The denial of charitable status should be one stage in a whole-of-government effort that could, in appropriate cases, see further investigation of a charity by CSIS or the RCMP.

The CRA should continue to work closely with other agencies to identify charities that may be involved in TF. The CRA should be included in the overall network of agencies that are concerned with TF, and it should have access to appropriate information from domestic and foreign agencies. It would be almost impossible for any regulator to find the indicia of TF by sifting through information about all charities. Intelligence must be shared to help identify targets. This will require the RCMP, and especially CSIS, to work closely with the CRA and to provide it with the best possible intelligence. Greater effort should be made to share general information about TF that is of common interest to all these agencies. For example, CRA is not a member of ITAC, while FINTRAC is. CRA could benefit from such membership.

The CRA has limited resources to devote to audits of charities. It is essential that the CRA receive the best intelligence possible from all sources about charities that may be involved in financing terrorism to make optimal use of its audit resources.

Largely because of changes introduced by Bill C-25 to the *PCMLTFA* late in 2006, the CRA can now share more extensive information with other agencies. However, it took considerable time for the changes allowing this increased sharing to come into effect. The impetus for change occurred on September 11, 2001. Bill C-25 was enacted only in 2006 and came into effect in stages. Its provisions were fully in force only in December 2008. Such delays are unacceptable.

As well, the CRA, RCMP, CSIS and FINTRAC would all benefit if reporting on the value of the exchanged information were made mandatory, or at least encouraged. Such follow-up would also help the National Security Advisor to review the effectiveness of Canada's efforts to combat TF, including how well the CRA, FINTRAC, CSIS and the RCMP are working together.

A charitable organization whose registration is revoked for terrorism or TF reasons should be reported to the appropriate agencies for further investigation. Revocation of charitable status should be only part of a response that includes continued intelligence operations and, possibly, law enforcement investigations.

7.8.2 Intermediate Sanctions

It is particularly helpful for the CRA to make full use of the "intermediate sanctions" now available to it (for example, monetary penalties or the suspension of a charity's power to issue tax receipts for donations) to encourage charities to "clean house" by removing directors and trustees who may be involved in terrorist activities. Creative and robust use of intermediate sanctions can indirectly achieve some of the goals that are obtained in the United Kingdom through a charity commission.

7.8.3 Statistics

It would be helpful to have statistics indicating the role that terrorism or TF issues play in decisions to revoke charitable registrations or to use intermediate sanctions. Such statistics would help determine the extent to which the Charities Directorate contributes to government-wide efforts to stop TF. Such information could also assist other agencies such as CSIS, RCMP, FINTRAC and the NSA. It would also be of value to have statistics, to the extent that these can be assembled, on the extent of TF through charities.

7.8.4 The *Charities Registration (Security Information) Act* Process

The question arises whether the *Charities Registration (Security Information) Act*[90] (*CRSIA*) process is necessary if it is not being used.

Canada has a legitimate interest in protecting information that could endanger national security or endanger persons if it were disclosed. The *CRSIA* allows secret intelligence to be presented to a judge while only a summary containing non-sensitive information is disclosed to the charity or person challenging the CRA. The *CRSIA* has a potential value in deterring TF and also underlines Canada's commitment to stopping the subversion of charitable status through TF. For these reasons, it should be retained.

Still, the CRA appears to have managed without invoking the *CRSIA* process. Although the *CRSIA* was created to allow the CRA to revoke or deny registration on the basis of classified information, organizations that support terrorism will likely also fail to meet other requirements for charitable registration and not obtain or lose charitable status for those reasons.

It is difficult to fault the government for not using the untested procedures of the *CRSIA* if it is possible to deny or remove charitable status on other grounds. Nevertheless, to demonstrate its ability to refuse to register charities without making use of the *CRSIA*, the CRA should be more transparent and keep better statistics about when concerns about TF have led to denial of charitable status.

Chapter VI described the debate about whether the *CRSIA* should contain a due diligence defence. The need for such a defence is difficult to assess at this time because no *CRSIA* certificate proceedings have yet occurred. However, the loss or denial of charitable status is not a consequence of the same magnitude as the prospect, for example, of detention or punishment for an individual. This may make the lack of a due diligence requirement in the *CRSIA* more defensible.

The lack of experience with the *CRSIA* also makes it difficult to assess other possible deficiencies, such as enabling the government to rely on secret evidence and the fact that the *CRSIA* does not on its face contemplate allowing security-cleared special advocates to see and challenge secret evidence. It

90 S.C. 2001, c. 41, s. 113.

would be helpful to have a track record of *CRSIA* certificate proceedings. Claims about deficiencies in the *CRSIA* could then be examined as real, rather than speculative, issues.

7.8.5 Not-for-profit Organizations

A serious obstacle hinders the fight against TF in Canada. Each province can control and regulate NPOs under section 92 of the *Constitution Act*, *1867*.[91] Rules vary among the provinces. In fact, there are few reporting rules in any of the provinces. As the organizations are non-profit, the CRA is normally not involved. The problem lies in the ability of NPOs to operate in a clandestine manner and to ignore what rules there are, making it almost impossible to identify TF within them.

There is obviously much to be gained by federal and provincial governments harmonizing their treatment of NPOs. The federal government should take the lead in bringing together provincial authorities to coordinate responses to the abuse of charitable or not-for-profit organizations. It is especially important that regulators be provided with the information and assistance they need to identify the abuse of charities and not-for-profit organizations for TF.

Organizations should also be prohibited from using the description "charity," "non-profit organization," "not-for-profit organization," or similar descriptions, unless registered as such with the CRA or the appropriate provincial agency.

7.8.6 Publicity

The CRA should, when practicable, publish reasons for denying or revoking the registration of charities or NPOs and for applying intermediate sanctions to charities. Indeed, publicity will be an important factor if these sanctions are to influence charities and NPOs to reform themselves and to alert potential donors that a given organization supports terrorism. The Commission acknowledges the tradition of keeping income tax information confidential. These concerns are laudable, but the traditional protection of tax information from disclosure needs to be reconsidered in light of concerns about terrorism.

7.8.7 Avoiding Harm to Legitimate Charities and NPOs

It is essential that measures to defeat the use of charities or NPOs for TF not unnecessarily impede the valuable activities of legitimate organizations. Any new guidelines or best practices that the CRA may contemplate to help it address TF in the charitable sector should be developed in close cooperation with the charitable sector. The work of honest charities should not be hindered because of unrealistic guidelines or best practices.

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91 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

7.9 International Aspects of Terrorist Financing

Funds can move across multiple jurisdictions and finance terrorists throughout the world. A 2007 Department of Finance Memorandum of Evidence on Terrorist Financing described the challenge that this presents:

> Because of the global reach of terrorist networks, the increasing integration of financial systems and the speed and facility with which money can be moved between jurisdictions, tracing and intercepting terrorist funding represents a major transnational challenge that is most effectively addressed through complementary international and domestic actions.[92]

FINTRAC reported that Electronic Fund Transfer Reports, provided by reporting entities, were contained in 93 per cent of its disclosures to law enforcement and security intelligence agencies in matters relating to TF or threats to the security of Canada.[93] The international nature of terrorism and TF makes the resulting investigations more complex and much lengthier than if the transactions involved were domestic only.[94] Superintendent Reynolds testified:

> [B]y the very nature of terrorism it's international. And the fact that it moves across borders and into areas where perhaps the infrastructure is broken down, it makes it extremely difficult to follow the paper trail as far as the cash – the movement of cash, the movement or procurement of materials.[95]

There is a need to integrate TF into the work of agencies including CSIS, DND and DFAIT. The Integrated Threat Assessment Centre (ITAC) situated in CSIS already provides some integration in terms of threat assessments.

Canada's cryptologic agency, the Communications Security Establishment (CSE), also needs to be integrated more effectively into anti-TF efforts. The NSA should, in his or her expanded role, ensure that CSE makes appropriate and necessary disclosures to FINTRAC. Such intelligence could help FINTRAC perform its analyses and make more useful disclosures of designated information to the RCMP, CSIS and other agencies.

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92 Exhibit P-227, Tab 3: Department of Finance Memorandum of Evidence on Terrorist Financing, February 28, 2007, para. 2.6. The FINTRAC *Report on Plans and Priorities for the years 2007-2008 to 2009-2010* expresses a similar view at p. 7, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/rpp/0708/fintrac-canafe/fintrac-canafe-eng.pdf> (accessed January 26, 2009).

93 Exhibit P-438: FINTRAC Response to Supplementary Questions of the Commission, January 9, 2008, Question 3(b).

94 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6820.

95 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6820.

7.9.1 Difficulties in Securing International Cooperation

The definition of terrorism varies from jurisdiction to jurisdiction. This in turn leads to inconsistencies in deciding what constitutes TF. In addition, anti-TF rules and programs are not identical, or interpreted identically, in all countries. This poses major challenges for attempts to secure cooperation from other countries. Keith Morrill of DFAIT highlighted the difficulties through a fictitious example:

> If Canada has an offence of terrorist financing, and we have listed the Faroffistan Widows and Orphans Fund because we know that that is being used to fund terrorists in the mythical country of Faroffistan, and the money moves from a bank account in Canada to a bank account in France, and France does not regard the Faroffistan Widows and Orphans Fund as being linked to a terrorist group, that greatly limits our capacity to have criminal law enforcement cooperation because what is to us an activity which seems to be linked to an offence is to France … simply a legitimate transfer of funds.[96]

A foreign country is not necessarily a "weak link" country. In fact, it could be a well-regulated country with an otherwise adequate anti-TF program, but the country may differ with Canada about whether a person or entity should be considered a terrorist or whether a given act constitutes terrorism.

In addition, as Superintendent Reynolds testified, it is "…[n]ot that it is difficult to get cooperation, but you're now into different judicial systems, different understanding, the priority of the organizations that you're dealing with changes, yours may not be the priority, so it slows down the process."[97]

Cooperation among agencies in Canada is often heavily regulated (such as through FINTRAC's and CRA's disclosure rules). When FINTRAC makes arrangements for international cooperation in TF, it faces even more hurdles than it encounters when cooperating with agencies in Canada. For example, FINTRAC can share information with financial intelligence units abroad, but only under the same conditions that it may share information with law enforcement agencies in Canada, and only if FINTRAC has a memorandum of understanding with the foreign FIU.[98] Furthermore, the FIU receiving information from FINTRAC must have specific provisions for the protection of privacy interests.[99] This process for sharing information is both formal and lengthy.

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96 Testimony of Keith Morrill, vol. 54, September 28, 2007, p. 6703.
97 Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6843.
98 *PCMLTFA*, s. 56.1.
99 Second FINTRAC Response to Supplementary Questions of the Commission, Question 6(b).

Professor Rudner commented on this in his paper for the Commission:

> Whereas the Egmont Group and other international organizations generally encourage and promote the sharing of financial intelligence, actual flows and exchanges of information between and among FIUs seem to be constrained by national privacy concerns, perhaps even more so than in other areas of security intelligence or law enforcement. In practice, national FIUs have tended to restrict the sharing of financial intelligence to foreign units and countries with whom bilateral agreements have been reached specifying the terms of such exchanges.[100]

As the 2008 FATF Mutual Evaluation of Canada noted, the mutual legal assistance (MLA) process is laborious.[101] The Commission did not receive evidence on this point, but it is clear that some countries, even Western countries, do not cooperate as fully with each other on TF matters as is warranted. While the FIU process described by Professor Rudner appears to function relatively well, information does not flow as freely as it should. As the passage of time dims the memory of 9/11, London and Madrid, Western countries will likely see even less urgency in cooperating on TF matters – unless there is a new major act of terrorism.[102]

7.9.2 The Problem of "Weak Links"

Adding to the difficulties in securing international cooperation is the reality that some countries are notoriously weak links in the global anti-TF system. For example, the FATF has warned about financial dealings in Iran and Uzbekistan because of heightened money laundering and TF risks.[103]

Countries that are considered state sponsors of terrorism are obviously the most problematic. Other countries, without being "official" state sponsors, are sometimes seen as sources, even if unwitting, for TF.

When funds leave Canada, they become more difficult to track. That difficulty increases if the funds enter a country deficient in financial controls and law enforcement – for example, Afghanistan or Sudan. "Weak links" in the global

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100 Rudner Article on Using Financial Intelligence, p. 49.

101 See 2008 FATF Mutual Evaluation of Canada, paras. 1477-1502. The report mentions that, on TF matters, Canada received 14 requests for assistance (during 2001-2006), with 8 being executed, 2 withdrawn and 4 being active. By way of comparison, 143 requests for assistance had been made on ML matters: see para. 1522.

102 A recent U.S. National Intelligence Estimate noted the likelihood that international cooperation will wane as 9/11 grows more distant: see Michael Jacobson, "Extremism's Deep Pockets: The growing challenge of fighting terrorist financing," p. 22, online: The Politic <http://thepolitic.org/content/view/91> (accessed June 3, 2009).

103 See FATF Chairman's Summary, London Plenary, June 18-20, June 20, 2008, online: Financial Action Task Force <http://www.fatf-gafi.org/dataoecd/50/1/40879782.pdf> (accessed January 29, 2009).

anti-TF system are valuable for terrorists. As American academic Philip Bobbitt wrote, "…[t]he system of global terrorist financing depends upon the inability of states to compel other states to disclose financial holdings and transfers."[104] Some jurisdictions, including the UK, have attempted to help strengthen the anti-TF system in "weak link" countries.[105]

7.9.3 Trade

Professor Passas identified poor surveillance of trade transactions as an important deficiency in countering TF in most countries, including Canada:

> Currently, there are serious gaps in the way government authorities deal with trade transactions. Incomplete, erroneous or illegal documentation can be found through routine review of forms filed with Customs agencies. There is plenty of room for improving enforcement action and attempts at rendering the transactions accurate and transparent. Mistakes and mis-statements concerning country of origin, ultimate consignee, counter-parties or value abound and reveal significant opportunities for misconduct, including terrorist finance. In other instances, trade diversion practices and mis-invoicing cannot be easily detected as the paperwork in such cases is not forged or fake but the content of the documents is wrong. Very high values can be moved literally under the nose of even quite careful inspectors. Such infractions may only be detected through inside information or in-depth checks and inquiries, which cannot be routinely instituted.
>
> Such vulnerabilities were found in the trade of precious stones and metals, electronics, medicine, cosmetics, textiles, foodstuff, tobacco, car or bicycle parts, etc.. In short, trade is currently not transparent and represents a serious threat to all efforts countering money laundering, terrorist finance or other financial crime.
>
> Given that financial and trade transactions are not jointly monitored and matched, irregularities, suspicious transactions and blatant abuses may be going undetected. Research has shown that irregularities amounting to billions of US dollars go undetected and uninvestigated. In the light of the large volumes of trade conducted daily, the risk of financing serious crime includes activities not only related to more expensive forms of terrorism as well as proliferation and weapons of mass destruction.[106]

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104 Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Knopf, 2008), p. 455.
105 Testimony of Paul Newham, vol. 58, October 4, 2007, p. 7244.
106 Passas Report on Terrorism Financing, pp. 83-84 [references omitted].

The FATF has discussed trade-based money laundering in two papers.[107] Although the FATF has made no recommendations about trade to date, some are said to be forthcoming. The FATF describes the problem with trade as follows:

> The Financial Action Task Force (FATF) has recognised misuse of the trade system as one of the main methods by which criminal organisations and terrorist financiers move money for the purpose of disguising its origins and integrating it into the formal economy. As the anti-money laundering (AML) and counter-terrorist financing (CFT) standards that have been applied to other money laundering techniques have become increasingly effective, such abuse of the trade system is expected to become increasingly attractive. However, currently, many customs agencies, law enforcement agencies, financial intelligence units (FIU), tax authorities and banking supervisors (i.e. competent authorities) appear less capable of identifying and combating trade-based money laundering than they are in dealing with other forms of money laundering and terrorist financing.[108]

7.9.4 Civil Redress for Terrorist Acts Committed Outside Canada

Several parties and intervenors forcefully suggested that the Commission support passage of a Private Senator Public Bill that was introduced to facilitate civil lawsuits against terrorists and their sponsors. Professor Ed Morgan of the Faculty of Law at the University of Toronto described civil remedies as "…one of the most effective and targeted means of curtailing the financing of terrorism that the legal system can endorse."[109] The Bill was S-225, *An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism*).[110] Proponents of civil redress argued that such lawsuits are a good vehicle for drying up terrorist funds. Lawsuits would thus become a component of the fight against TF.

At present, Canadian law allows civil suits against foreign states for a breach of contract or a personal injury that happened in Canada, but this does not include remedies for sponsoring acts of terrorism which occur abroad and injure or kill Canadians. The summary that accompanied the first reading version of Bill S-225, which died on the Order Paper when Parliament was prorogued for the

107 "Trade Based Money Laundering," June 23, 2006, online: Financial Action Task Force <http://www.fatf-gafi.org/dataoecd/60/25/37038272.pdf> (accessed January 24, 2009); "Best Practices Paper on Trade Based Money Laundering," June 20, 2008, online: Financial Action Task Force <http://www.fatf-gafi.org/dataoecd/9/28/40936081.pdf> (accessed January 24, 2009) [FATF Best Practices Paper on Trade Based Money Laundering].

108 FATF Best Practices Paper on Trade Based Money Laundering, para. 1. See also *FATF Annual Report 2007-2008*, June 30, 2008, online: Financial Action Task Force <http://www.fatf-gafi.org/dataoecd/58/0/41141361.pdf> (accessed January 27, 2009).

109 Testimony of Ed Morgan, vol. 55, October 1, 2007, p. 6897.

110 2nd Sess., 39th Parl., 2007. Several similar bills have been introduced over the years.

October 2008 election, described the purpose of the Bill as follows:

> This enactment amends the *State Immunity Act* to prevent a foreign state from claiming immunity from the jurisdiction of Canadian courts in respect of proceedings that relate to terrorist conduct engaged in by the foreign state.
>
> It also amends the *Criminal Code* to provide victims who suffer loss or damage as a result of conduct that is contrary to Part II.1 of the *Criminal Code* (Terrorism) with a civil remedy against the person who engaged in the terrorist-related conduct.[111]

The main provisions of Bill S-225 can be summarized as follows:

- A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to terrorist conduct engaged in by the foreign state on or after January 1, 1985;
- The Minister of Finance and the Minister of Foreign Affairs must assist any judgment creditor to identify, locate and execute against the property of the foreign state or certain other entities; and
- Any person who has suffered loss or damage on or after January 1, 1985, as a result of conduct by any person, including a foreign state, that constitutes an offence set out in Part II.1 of the *Criminal Code* (dealing with terrorism) can, in any court of competent jurisdiction, sue the person or foreign state.[112]

The first provision mentioned above would have allowed victims of the Air India tragedy to sue in Canadian courts any foreign actor that may have contributed to the tragedy. Professor Morgan testified that the clause was meant to apply to state sponsors of terrorism. If the Bill had been enacted, it would have allowed some degree of enforcement by private individuals of laws against terrorism and TF.[113]

Bill S-225 would have allowed a victim of terrorism to sue a bank that may have provided financial services to terrorists. What is not clear is how, if the bank was not convicted criminally, the victim would be able to demonstrate on a balance of probabilities that the bank had contravened the *Criminal Code*. The courts would also have to determine the validity of the Bill's attempt to give *Criminal Code* provisions a retroactive effect, if only for the limited purposes of civil, not criminal liability.

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111 Summary notes of Bill S-225, online: Parliament of Canada <http://www2.parl.gc.ca/content/Senate/Bills/392/public/S-225/S-225_1/S225-e.htm> (accessed January 24, 2009).

112 This includes the *Criminal Code* anti-TF provisions. Morgan stated that: "That proposal is, more or less, modeled on section 36 of the *Competition Act* which, as you know, gives a civil cause of action to anyone who has suffered damages as a result of a defendant engaging in any of the quasi-criminal provisions of the *Competition Act*": Testimony of Ed Morgan, vol. 55, October 1, 2007, p. 6902.

113 Testimony of Ed Morgan, vol. 55, October 1, 2007, p. 6903.

As mentioned earlier, several parties and intervenors made submissions about civil liability, most notably the Canadian Jewish Congress and the Canadian Coalition Against Terror (C-CAT).[114] C-CAT maintained that the Canadian legal framework does not provide adequate constraints to combat TF and that the campaign against TF requires innovative strategies such as those proposed in Bill S-225.[115] According to C-CAT, Bill S-225 would "…(i) deter future acts of violence (by bankrupting or financially impairing the terrorist infrastructure); (ii) hold the wrongdoers responsible (even where the criminal system has failed); (iii) compensate victims; and (iv) enable terrorist assets to be located and seized."[116] C-CAT cited American examples to support its position.

As noted above, Bill S-225 died with the calling of the 2008 federal election. Despite the failure of this Bill to proceed, Canadian citizens filed a civil lawsuit in Quebec Superior Court in July 2008 against the Lebanese Canadian Bank, whose sole foreign representative office was in Montreal.[117] The claim alleged that the plaintiffs were injured while in Israel in 2006 by rockets launched by Hezbollah. The plaintiffs also alleged that the bank provided extensive financial and banking services to Hezbollah. The total compensation sought was $6.15 million. In August 2008, the matter was adjourned indefinitely. While this lawsuit did not involve a foreign state, it did represent a new way of fighting TF, as recommended by C-CAT, and the progress of this and future cases merits watching.

7.10 The Reality Facing Efforts to Suppress Terrorist Financing

Donna Walsh, Director of the Review and Analysis Division in the Charities Directorate of the CRA, testified that "…countering terrorist financing is a complex issue. No one strategy or measure will stop it."[118] In his paper, Professor Passas called measures to counter TF "necessary and vital," but also called for "realistic expectations and targets."[119]

An approach involving shared intelligence provides the best prospect for success against TF, especially in an environment of limited resources. Agencies such as the RCMP and CSIS will play a critical role in providing information to FINTRAC and the CRA. In TF matters, the RCMP and, in particular, CSIS are best suited to adapt quickly, observe the evolution of events, identify the important players and understand the variables involved. For example, an individual's deposit of a small amount of money might not raise a bank's suspicion. As a result, information about the transaction would not be reported to FINTRAC. However, a front-line intelligence agent who knew about the individual's links to terrorism might have suspicions about the transaction. Furthermore, the agent

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114 Both also made submissions to the Standing Senate Committee.
115 Final Submissions by the Canadian Coalition Against Terror (C-CAT) to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, January 31, 2008 [C-CAT Final Submissions].
116 C-CAT Final Submissions, p. 7.
117 *Yefet, Sappir, Shalmoni v. Lebanese Canadian Bank* (Qc. Sup. Ct.), Docket No. 500-17-043962-086.
118 Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7109.
119 Passas Report on Terrorism Financing, p. 106.

might understand how a group raises and moves money, and the transaction might follow that pattern. In short, the agent might understand the subtleties of TF that would escape detection by a formal and mechanical reporting system.

The entire AML/ATF Initiative must shift from relying primarily on formal reporting systems and instead ensure adequate resources for law enforcement and security intelligence agencies to work together effectively.[120] As mentioned above, there is also a need to invest more in educating private sector entities to help them identify suspicious transactions and report them to FINTRAC.

7.11 Ways to Develop "Human Capital" for Anti-Terrorist Financing Efforts

An effective approach to TF will require both an increase in the sharing of information and increased investment in human capital. One way to achieve the latter goal is to facilitate increased secondments among agencies working on TF issues. This is now done for the Integrated Threat Assessment Centre and is suggested in Volume Three for the office of the National Security Advisor. FINTRAC already has a secondee from the RCMP Proceeds of Crime Unit,[121] and this program should be expanded to include secondees from agencies involved in counterterrorism. Secondment opportunities allow limited resources to be shared. Moreover, they allow junior and senior officials to develop a whole-of-government perspective on TF issues and improve cooperation among agencies.

Employees seconded to one agency would face the same statutory restrictions on access to their home agency database as any other employee of the agency to which they are seconded. In other words, the agency to which a FINTRAC employee is seconded (for example, the RCMP) would not receive greater access to FINTRAC information simply because a FINTRAC employee is seconded to that agency.

The response of one senior official in charge of the CSIS anti-TF program to a question about the magnitude of the problem illustrates the gaps in understanding: "I haven't been able to sit back and do a proper analysis like that. So I really can't comment on that. I know we're very busy in my office and there is no lack of files."[122] The official cannot be faulted if the resources were not available for such an analysis.

Professor Passas expressed concern about the lack of reliable information about TF:

> The lack of confirmed and validated information about terrorism finance limits the effectiveness of [anti-TF] efforts.

120 This view is supported by Passas: see Passas Report on Terrorism Financing, pp. 95-98.
121 Exhibit P-442: Summary of Meeting between Commission Counsel and FINTRAC, April 10, 2008, p. 3.
122 Testimony of Jim Galt, vol. 55, October 1, 2007, p. 6913.

> Canadian authorities have stressed the integration of the various agencies involved in counter-terrorism. This may be the case in Canada, but not everywhere else. Limited intelligence distribution to different domestic agencies and overseas counterparts is a long standing problem that could be resolved through the use of a terrorism finance database supported by open source information.[123]

FINTRAC officials were asked whether a database existed on matters such as TF cases, prosecutions and media reports worldwide, and whether, if one did not exist, such a database would be helpful. They responded as follows:

> There are numerous databases that contain valuable information on terrorist groups and incidents that FINTRAC consults as part of its analytical work. To FINTRAC's knowledge there is no comprehensive database which includes all relevant TF information that would be of value to FINTRAC exercising its mandate. Any database that contained reliable information on all aspects of every terrorist activity financing case would be very useful.[124]

The type of database on TF cases proposed by Professor Passas would provide a relatively inexpensive tool to help government agencies and private sector entities improve their understanding of TF and related issues.

7.12 The Kanishka Centre(s) for Better Understanding and Preventing Terrorism

There is a need to develop the next generation of security professionals in government and to provide a means for existing professionals to enrich their understanding of terrorism and TF. Many of the recommendations made by the Commission flow from the realization that much work needs to be done if Canada is to match international best practices regarding the relationship between intelligence and evidence, terrorism prosecutions, witness protection, TF and aviation security. There is a need for continuing study of these issues in light of both rapidly changing circumstances in the world and Canada's own experience. Canada cannot afford to wait until the next terrorism tragedy occurs and another public inquiry is appointed to study the adequacy of its counterterrorism measures.

A number of researchers who prepared reports for this Commission commented on the lack of dedicated governmental support for research on terrorism issues. They spoke of the adverse effects that this lack of funding has had on public understanding of the challenges of terrorism and on the availability of trained

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123 Passas Report on Terrorism Financing, p.92.
124 Second FINTRAC Response to Supplementary Questions of the Commission, Question 7.

people to do vital counterterrorism work. For example, Professor Rudner argued that, despite increased interest in terrorism among the public and students after 9/11, the capacity of Canadian institutions of higher education to exercise knowledge leadership remained "grossly inadequate":

> Very few university courses or programs dealing with intelligence and/or National Security studies are currently on offer in Canada….[R]esearch remains grievously constrained by a dire lack of financial support, even from official funding councils, coupled with acute staff shortages. It is indicative of the absence of priority that out of more than 1,800 Canada Research Chairs established in Canadian universities since 2000….not a single one was dedicated to Intelligence Studies. Not one. Just one Canada Research Chair relating to terrorism studies was recently established at Université Laval in Quebec City. Compared to the rather more dynamic situation in American, Australian and British universities and research institutions, Canada's educational and research capacity in these fields of vital national security concern remains woefully understrength.[125]

Professor Wesley Wark of the Munk Centre for International Studies at the University of Toronto stressed the need "…to open up both our historical and our present national security activities to greater and more informed public scrutiny"[126] in order to learn from past mistakes and develop a baseline for determining success.

Professor Kent Roach of the Faculty of Law at the University of Toronto noted that "…Canadian research into terrorism related issues has generally been relatively sparse. There is no dedicated governmental funding for research related to the study of terrorism and optimal counter-terrorism measures as there is in other fields such as military studies."[127]

In its final submissions, the Air India Victims Families Association suggested that "…[t]he federal government should provide funding for the establishment of an academic Centre of Excellence to be known as The Kanishka Centre as a living memorial to the victims and families of the bombing of Air India Flight 182."[128] The Association contemplated a "multi-disciplinary Centre within a University setting" that could "bring together expertise and discourse from policy, operational, and academic communities to address the study of terrorism

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125 Martin Rudner, "Building Canada's Counter-Terrorism Capacity: A Proactive All-of-Government Approach to Intelligence-Led Counter-Terrorism" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, pp. 141-142.

126 Wesley Wark, "The Intelligence-Law Enforcement Nexus" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, p. 181.

127 Kent Roach, "Introduction" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, p. 8.

128 AIVFA Final Written Submission, p. 98.

prevention and its related fields, with the intent of working with and assisting governments in this endeavour."[129]

Careful consideration could usefully be given to setting up such a research organization. A precedent for such a research program exists in the long-running Security and Defence Forum (SDF) sponsored by the Department of National Defence. The Department funds 12 "centres of expertise" in Canadian universities, with grants of between $100,000 and $165,000 per centre per year, as well as a Chair of Defence Management Studies.

Creating a research organization would respond to some of the problems that the Commission has identified, including inadequate public understanding of the dangers of terrorism. Exchanges between governments and such a research organization could enrich human capital on terrorism issues both within and outside of government.

7.13 Conclusion

Canada's anti-TF program is still relatively young.[130] The *Anti-terrorism Act* received Royal Assent in late 2001, and anti-TF operations began shortly after. The provisions governing the anti-TF program during its first few years limited its potential for success, but Bill C-25, which came into force in stages beginning in late 2006, enhanced that potential. However, it is still too early to tell if the Bill C-25 changes will increase the effectiveness of anti-TF measures.

The time may have come to use distinct legislative schemes to deal with money laundering and TF. By pursuing the fight against TF on the basis of the current money laundering model, there is a danger that TF transactions will be lost among the much larger sums involved in money laundering and organized crime. There is a danger as well that private sector reporting entities might view their anti-TF work almost as an afterthought, less important than their work on money laundering.

At several points, this chapter discussed the need for better sharing of information among agencies involved in countering TF. Such an approach is necessary because of the difficulties that FINTRAC would face if it were to rely solely on examining the millions of financial transaction reports that it receives yearly. The CRA processes thousands of applications for charitable status each year and faces a similar problem of pinpointing suspicious activity. FINTRAC and the CRA both require good intelligence to help them focus their limited resources. Hence, the RCMP, CSIS and other agencies should continue to work closely with FINTRAC and the CRA to provide them with the best possible intelligence about TF.

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129 AIVFA Final Written Submission, p. 98.

130 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6765; Testimony of Mark Potter, vol. 56, October 2, 2007, p. 6967.

FINTRAC and the CRA also need to be better integrated into the broader intelligence community through measures such as secondments and joint training. They need to see themselves as a vital part of an intelligence cycle that may, in some cases, contribute to successful prosecutions and may, in other cases, facilitate preventive or disruptive measures.