SUBMISSIONS OF THE FAMILY MEMBERS OF THE CREW VICTIMS OF AIR INDIA FLIGHT 182 AND INDIAN NATIONALS, AIR INDIA CABIN CREW ASSOCIATION, SANJAY LAZAR and ALEEN QURAISHI

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SUBMISSIONS

Introduction

These submissions are made on behalf of the Family Members of the Crew Member Victims of Air India Flight 182 and Indian Nationals, The Air India Cabin Crew Association, Sanjay Lazar and Aleen Quraishi. While these parties are not exclusively residents of India and, in fact represent family victims from Canada and other parts of the world, they are collectively referred to as the "**Indian Nationals**".

The Indian Nationals wish to express their sympathy to the family members of all of the victims who were killed in the bombing of Air India Flight 182. They also express their thanks to the people of Ireland who provided care and support to the family members and to the Irish rescuers for their heroic efforts and sacrifice.

In the Affidavit of Shipra Rana filed in support of the Application of the Indian Nationals for Standing, Ms. Rana stated that the Indian Nationals "**have had limited involvement and representation with respect to the gathering and dissemination of information respecting the Air India tragedy or the impact of the Air India tragedy upon the lives of the families of the crew members and Indian Nationals**". By virtue of the Ruling of the Commissioner granting the Indian Nationals full standing and funding, the Indian Nationals have now had an opportunity to participate in the on-going process as the Canadian Government and others have sought to understand the events leading up to and following the Air India tragedy.

The Indian Nationals thank the Canadian Government for its direction by Order in Council that a Commission be held under Part I of the *Inquires Act* to conduct an Inquiry into the of the bombing of Air India Flight 182 (the "**Inquiry**"). The Indian Nationals thank the Honourable John C. Major, Q.C., (the "**Commissioner**") for his hard work, time and effort in maintaining a focus on the essential facts and questions raised by the Terms of Reference and for using his persuasive abilities in order to ensure that the Inquiry proceeded as a "public inquiry" and not an inquiry held behind closed doors and cloaked in secrecy.

These submissions will not be directed to all of the issues posed by the Terms of Reference as other counsel for the "Family Interests", as defined in the Ruling of the Commissioner, will be making detailed Submissions respecting the issues raised by the Terms of Reference over which they assumed primary responsibility consistent with the collaboration expected of and undertaken by counsel. These Submissions and Recommendations will deal with issues of particular concern to the Indian Nationals and specifically with respect to Canada's legal framework with respect to terrorist financing. The submissions made by other counsel for the Family Interests are endorsed and supported by the Indian Nationals.

The Tragedy

The Air India Bombing had its roots in the political unrest in India and, specifically the Punjab, in the 1960s and the 1970s. Throughout those decades, there was a heightened demand for political independence for a separate Sikh based territory in Punjab. Sikh separatists sought an independent state, to be called Khalistan, and began to gather arms and supporters centered around Sikhism's holiest shrine, the Golden Temple, at Amritsar. In reaction to growing unrest, the Indian army launched an attack known as "Operation Bluestar" on the Golden Temple in June of 1984 resulting in the death of nearly 1,000 people and the destruction of many significant Sikh religious documents and historical records. Following that attack, on October 31, 1984, the Indian Prime Minister, Indira Gandhi, was assassinated by her Sikh body guards, an event along with others which evidenced the dramatic radicalization of Sikh activism in India and around the world. In Canada, the Babbar Khalsa Sikh Society of Canada ["Babbar Khalsa"] was incorporated in British Columbia in November of 1984, the stated purpose of the Society being to promote and maintain the character of Sikhism and to struggle for the establishment of a Sikh homeland. The Applicants for the incorporation of the Babbar Khalsa included Talwinder Singh Parmar, Surjan Singh Gill, Ajaib Singh Bagri and Gurmit Singh Gill, all of whom were individuals later implicated in the plot and events surrounding the bombing of Air India Flight 182.

Throughout the Fall, Winter and Spring of 1984 and 1985, Sikh extremists in Canada became more radical and threats of violent actions by Sikh extremist heightened. On

June 22, 1985, baggage containing bombs were placed on two airplanes at the Vancouver Airport, Air India Flight 182 and Canadian Pacific Flight 003. At approximately 11:15 p.m. on June 22, 1985, a bomb in baggage removed from Canadian Pacific Flight 003 exploded at Narita Airport killing two baggage handlers and injuring 4 others. At approximately 12:14 a.m. on June 23, 1985, a bomb exploded in the baggage compartment of Air India Flight 182 blowing up the aircraft and causing it to plunge 31,000 feet into the Atlantic Ocean off the west coast of Ireland, killing 329 passengers and crew. Of those killed, 137 were under the age of 18 and 82 were children under the age of 13. The lives of the family members were forever changed.

The Honourable Bob Rae, independent advisor to the Ministry of Public Safety and Emergency Preparedness, in his Report entitled "**Lessons To Be Learned**" stated :

> **"While statements were made in House of Commons in the immediate aftermath of the disaster, many families continue to express their profound sense that the Air India bombing was never truly understood as a Canadian tragedy.**
>
> **Let it be said clearly: The bombing of the Air India flight was a result of a conspiracy conceived, planned and executed in Canada. Most of its victims were Canadians. This is a Canadian catastrophe whose dimension and meaning must be understood by all Canadians."**

The Indian Nationals appreciate and respect the intent of the words of Mr. Rae. However, the Indian Nationals submit that Canadians and the Canadian Government must recognize that the bombing of Air India Flight 182 was more than just a Canadian tragedy and was also a tragedy impacting on all of the family members of the victims of the bombing whether Canadian, American, Indian or otherwise.

Thankfully, the Commission appears to have recognized by its Ruling on Standing the impact of the bombing on the Indian Nationals and others. It is submitted that this Commission ought to encourage and require that the Canadian Government acknowledge its responsibility and accountability to all of the family members of the victims of Air Flight 182 wherever they may be, as a result of the failure by the Canadian Government, through its many agencies, to properly assess and respond to the threats posed by Sikh terrorism, to effectively investigate and prosecute the perpetrators of the bombing of Air India Flight 182 and to establish and ensure effective airport safety procedures.

While not provided for specifically in the Terms of Reference, the Indian Nationals submit that this Commission should consider the extent to which the Canadian Government provided compensation to family members in Canada who commenced civil actions in the years following the Air India tragedy and, bearing in mind the apparent efforts by Canadian authorities to minimize the extent of its responsibility and culpability with a view to facilitate the early settlement of those actions, that the Commission ought to make the following **RECOMMENDATION**:

That the Canadian Government establish an independent body to review and consider the extent to which compensation was paid by the Canadian Government to the family members of the victims of Air India Flight 182 and to ensure and provide for the payment of compensation upon an equitable and fair basis to all of the family members of Air India Flight 182, wherever they may be, excepting to the extent to which compensation has already been paid.

The Indian Nationals urge the Commission to make this Recommendation as, if implemented, it will evidence that the Canadian Government accepts responsibility and accountability for its role in permitting the conspiracy to bomb Air India Flight 182 to be conceived, planned and executed in Canada.

"O Canada, we stand on guard for thee…"

The Indian Nationals recognize that Canada is a great country. People from all parts of the world seek to immigrate to this country to live, work and raise their families. Most of the victims of this tragedy did as well. Canada treasures and respects fundamental human rights and promotes and shares a quality of life that most of the world has never and will never achieve. This Commission is evidence of the length to which Canada goes to "guard" the rights and quality of life of its people.

However, sadly, it is submitted that the events leading up to and following the Air India bombing evidence a failure by the agencies of the Canadian Government to live up to the words of its Anthem.

The first question posed by the Terms of Reference is:

> **"If there were deficiencies in the assessment by the Canadian Government officials of the potential threat posed by Sikh terrorism before or after 1985, or in their response to that threat, whether any changes in practice or legislation are required to prevent the recurrence of similar deficiencies in the assessment of terrorist threats in the future"**

The Indian Nationals submit that there is little doubt that there were serious deficiencies in the assessment by the Canadian Government officials of the threats posed by Sikh terrorism both before and after 1985. Professor Wesley Wark testified that the bombing of Air India Flight 182 had to be viewed as a failure of intelligence and was related to the material changes in the Canadian intelligence community arising as a result of the creation of the Canadian Security Intelligence Service ["CSIS"] in 1984. He testified as to the threats of Sikh extremists not being taken seriously by CSIS and emphasized that the intelligence failure resulted from the inability of CSIS to sustain meaningful surveillance and wiretap evidence, in particular, with respect to Talwinder Singh Parmar ["Parmar"], and with respect to the lack of experience and resources of CSIS.

Jeffery O'Brien, formerly Director General and Director of Operations of CSIS, testified with respect to the limited ability of CSIS to react to threats as its duties are limited to collecting, analyzing and retaining information regarding threats rather than to taking active steps in enforcement and arrest. He highlighted the inherent conflict between policing and intelligence agencies arising from the distinctions as to their powers and differing requirements with respect to evidentiary rules. Henry Jensen, formerly Deputy Commissioner of the RCMP, gave evidence with respect to the issue of tape erasure maintaining that tape retention was necessary as any potential evidence should not be destroyed due to the importance of hearing "nuances" in conversations recorded.

Professor Jean-Paul Brodeur testified with respect to the inability of CSIS to properly assess threats in the period 1984 to 1989 emphasizing the effect of competition between the RCMP and CSIS with respect to sources and intelligence. He spoke of the inherent conflict arising between policing and intelligence services and the distinction between intelligence and evidence. He emphasized the importance of having appropriate ethnic representation in policing and intelligence agencies in order to gain the confidence and willingness of the members of the community to participate in intelligence gathering. Clearly, the evidence demonstrates the failure of the Canadian Government agencies to have appropriate representation from the Sikh community and throughout the evidence there was an undercurrent of the detrimental effects of systemic racism.

Commission counsel led evidence of many witnesses citing examples of warnings throughout 1984 and 1985 which should have alerted the RCMP and CSIS to the eventual actions of the Sikh terrorists and the bombing of Air India Flight 182. It serves no purpose for the Indian Nationals to review all of the evidence but a brief review of some of the evidence is instructive as supporting the submission by the Indian Nationals that if the warnings had been properly analyzed, understood and pursued, it may have resulted in the prevention of the Air India bombing. Those warnings included:

(a)	August, 1984	In August of 1984, an individual described as "Person 1" claimed that he was offered $200,000.00 in cash by Parmar to place a bomb on an Air India flight departing from Montreal.
(b)	September, 1984	Rick Crook of the Vancouver Police Department testified that in September, 1984, an individual described as "Person 2" advised of a plan to bomb two Air India planes. The information was provided to CSIS and the RCMP amongst others.
(c)	October 1984 to March 1985	There was evidence as to the delay of CSIS in obtaining a warrant to conduct surveillance and wiretaps with respect to Parmar in the period October 1984 to March 1985 notwithstanding that Parmar had been identified by that time as "the most radical and potentially dangerous Sikh in the country".

(d)	June 1, 1985	What has been identified as the June 1, 1985, telex was received from Indian sources revealing the likelihood of acts of sabotage being undertaken by Sikh extremists by placing time/delay devices in aircraft or registered baggage. The RCMP did not provide CSIS with either the telex or the substance of the information contained therein. If that telex or the information had been provided to the CSIS, it is reasonable to assume that CSIS may not have maintained its assessment that there was no specific threat against Air India.
(e)	June 4, 1985	Margaret Lynne Jarrett of CSIS testified she conducted surveillance on Parmar, Reyat and another unknown person with respect to what has become known as the "Duncan Blast". For reasons that are somewhat unclear, a conclusion was made that a gunshot had been fired although later, following the bombing, a proper search and test led to the conclusion that a bomb had been tested.
(f)	June 9, 1985	On or about June 9, 1985, members of the Malton Sikh Temple were advised not to fly Air India as it would be unsafe to do so. The Malton Sikh Temple was associated with Babbar Khalsa.
(g)	June 12 1985	Don McLean of the Vancouver Police

		Department testified as to an intercept received on or about June 12, 1985, between two men he described as Sikh extremists which took place in the home of a Sikh businessman named Khurana. This intercept, identified as the "Khurana Tape", spoke of future terrorist activities with one of the men, Pushpinder Singh, stating "you will see something be done in two weeks."
(h)	June 21/22, 1985	On or about June 21 or June 22, 1985, an intercept was obtained by CSIS wherein Parmar was heard to be speaking in "coded" language with Gill saying "have you delivered those papers … delivered his clothes to the same place".
(i)	June 22-23, 1985	James K. Bartleman, formerly with Foreign Affairs and International Trade Canada, testified that he saw an intercept from the Communications Security Establishment ["CSE"] describing a specific threat against Air India Flight 182 for the weekend of June 22 and June 23, 1985. His evidence was that he took the intercept seriously and shared it with a senior RCMP officer at meeting of the Sikh Terrorism Task Force.

It should be remembered and emphasized that the threats, warnings, and intelligence being received throughout 1984 and 1985 were not being received in a vacuum. There was a general awareness of the nature of the unrest in India and the increasing militancy and violent behaviour of Sikh extremists in India and, in particular, in Canada. The evidence of William Warden, formerly High Commissioner to India, was that he was regularly called before the Indian Government following the Golden Temple incident to be advised of concerns as to Canada's inaction in dealing with Sikh extremism and to heighten his awareness with respect to Sikh extremists in Canada who were plotting against Indian missions and citizens. Gordon Smith, former Deputy Minister of Political Affairs with the Department of External Affairs, confirmed that CSIS, the RCMP and other Canadian officials were receiving statements regarding threats against Air India on a weekly basis from the Indian Government.

Unfortunately, even given the knowledge of growing Sikh extremism and violence and being aware of the warnings and threats, it is apparent that CSIS was ill prepared to effectively deal with and respond to the threats. John Henry, formerly Head of the CSIS Threat Assessment Unit, testified that the Sikh desk comprised of two individuals prior to the bombing. Bob Burgoyne, formerly with CSIS, an individual responsible for Sikh extremism in 1984 and 1985, emphasized the limited training and limited resources of CSIS at that time and his efforts to convince his superiors that greater attention should be accorded to Sikh extremists. Ray Kobzey, formerly with CSIS, spoke of his efforts to

prepare a briefing package in order to assist in preparing the affidavit to obtain a warrant with respect to Parmar and the lack of resources to provide proper coverage of Parmar.

The totality of this evidence leaves little doubt that there were deficiencies in the policing and intelligence services and in the actions taken by those services in analyzing and responding to the warnings of Sikh extremism. The deficiencies were compounded by the apparent inability or unwillingness of policing and intelligence agencies to cooperate and share information so that the "dots could be connected" and the bombings averted.

The Submissions of other counsel for the family interests will examine in detail the deficiencies in policing and intelligence, the problems in the effective cooperation between Government departments and agencies, including RCMP and CSIS, airport security issues and the steps Canadian Government has taken to address those problems or the steps it ought to take, and the other questions posed by the Terms of Reference. These Submissions will now focus on what steps the Canadian Government has taken regarding terrorist financing.

Terrorist Financing

It is important to the Indian Nationals that it be emphasized that it is only in the months following September 11, 2001 that Canada followed the course of other countries in enacting its own anti-terrorism law, the *Anti-Terrorism Act* S.C. 2001 c-.41 (the "*Anti-*

Terrorism Act"]. That action of the Canadian Government, just as many other of the actions taken by the Canadian Government respecting terrorism, followed the September 11, 2001 World Trade Centre tragedy and not the Air India tragedy. That speaks to the inadequacy of the Canadian Government's response to the Air India tragedy and whether it accepted responsibility and accountability for the tragedy and truly recognized the bombing as a Canadian tragedy.

The question posed by the Terms of Reference regarding Terrorist Financing is:

> **"Whether Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organization."**

Professor Passas noted the definition of terrorist financing to be "the financial support, in any form, of terrorism or of those who encourage, plan or engage in it." The definition makes it clear that determining "who" is engaged in terrorist financing is fundamental to any consideration as to restraining terrorist financing. John M. Schmidt, of the Integrated Threat Assessment Centre ["ITAC"], in his evidence, at pages 6665 and 6666 of the Transcript of the Hearings, accepted the proposition that "most terrorist financing activities are still identified after having first identified… the relevant terrorists or their supporters and then looking for their financial transactions." In the ITAC Intelligence Assessment dated March 24, 2006, [Exhibit 223, Tab 2, page 2], it is stated:

> **"disrupting of the financing of terrorists is a key component of the worldwide terrorist effort. While the laws of many countries contain severe criminal sanctions for securing, transferring and holding funds for terrorist organizations, these laws can only be enforced if actionable intelligence is available on the means by which terrorism is funded… terrorists has proven resilient in circumventing restrictions and shifting their reliance among the many conventional and unconventional financial transaction options".**

It is important then to consider not only the legal framework but also to consider the extent to which the intelligence gathering agencies participate in directing the anti-terrorist financing efforts.

It is interesting to note the evidence of Professor Mark Sidel in response to the Commissioner's question as to the estimate of 8% of terrorist financing going through charities in Canada:

> **"THE COMMISSIONER: There is a perception here that the misuse of charities were a significant factor in financing terrorism. It's in our terms of reference. The evidence that we've heard belies that to the extent that it's 8 per cent; it's an important amount nonetheless but it does – it's not the overpowering source of funds for terrorist activities.**

> **PROF. SIDEL: To the degree that there is a consensus in the United States on these issues and, as I said before, there is no consensus on percentages, I do think that there is a consensus that there are many other mechanisms whereby funds can flow to terrorist operations and organizations far more easily than through charitable institutions." [10874-75 of Transcript of Hearing]**

Professor Passas emphasized in his evidence the many methods of transferring funds which are unregulated and unmonitored.

This evidence demonstrates the necessity of using intelligence gathering services to identify terrorist groups that need to be monitored closely and in particular need to have their finances monitored closely. This leads to the need for a "risk-based" approach rather than a "rules-based" approach.

The Canadian Government has passed legislation to assist in the fight against terrorism. The *Anti-Terrorism Act* ["ATA"] amended various Acts including the *Criminal Code, Proceeds of Crime ("Money Laundering") and Terrorist Financing Act* ("PCMLTFA"), *Charities Registration (Security Information) Act* ("CRSIA"), the *Canadian Evidence Act* and the *National Defence Act* with a view to strengthening the ability to identify, prosecute and convict terrorists and to provide additional investigative tools to law enforcement and national security agencies. The Criminal Code now defines "terrorist

activity" and "terrorist groups" and creates terrorism offences for those engaged in terrorist activities or participating in terrorist groups.

The amendments to the CRSIA by the ATA sought to enhance the Canada Revenue Agency's role in protecting the integrity of Canada's registration system for charities including the use of information gathered to determine whether or not organizations can register or retain their status as charities as under the *Income Tax Act.*

Under the *United Nations Act*, RSC 1985, c.U-2, Canada sought to give effect to the resolutions of the United Nations including adopting resolutions of the United Nation's Security Council to assist in the suppressing of terrorism.

The United Nations Security Council issued its Resolution 1373 (2001) on September 28, 2001, in response to the events of September 11, 2001 directing that all states shall:

> **"(a) Prevent and suppress the financing of terrorist acts;**
>
> **(b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;**

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts, or participate or facilitate the commission of terrorist acts…

(d) Prohibits their nationals or any person and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts…".

Resolution 1373 (2001) further provides that all States shall:

"(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts…

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provisions of early warnings to other States by exchange of information;

(c) Deny safe havens to those who finance, plan, support, or commit terrorist act, or provide safe havens …

(d) Prevent those finance, plan, facilitate or commit terrorist act from using their respective territories for all those purposes against other states or citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice…"

In addition, Canada, as a member of the G-7 countries established under the Financial Action Task Force ("FATF") participates in the development and promotion of national and international policies to combat money laundering and terrorist financing. In October of 2004, FATF published its Special Recommendations on Terrorist Financing which included the importance of all countries taking action to combat terrorist financing, including actions to criminalize the financing of terrorism and associated money laundering, freezing and confiscating terrorist assets, reporting suspicious transactions related to terrorism, providing for international cooperation, taking measures to licence and regulate entities which provide services for the transmission of money or value, taking measures to ensure that financial institutions, including money remitters, conducting enhanced scrutiny and monitoring suspicious activities with respect to fund transfers, the monitoring of cash couriers and establishing adequate laws and regulations with respect to non-profit organizations. Specifically, the FATF Special Recommendations on Terrorist Financing state in part:

"Each country should criminalize the financing of terrorism, terrorist acts and terrorist organizations… Each country should implement measures to freeze without delay funds or other assets of terrorist… If

> **financial institutions, or other businesses or entities, subject to money laundering obligations, suspect or have reasonable grounds to suspect funds that are linked to or related to or to be used for terrorism, terrorist acts, or by terrorist organizations, they should be required to report promptly their suspicions to the competent authorities."**

Clearly, the Canadian Government has taken legislative and regulatory steps to support the various international initiatives and demonstrate its sincerity and commitment to fighting the war against terrorism, including steps directed specifically to terrorist financing.

There are many government departments and agencies that play an important role and are empowered to fight terrorism and terrorist financing.

The following are departments and agencies of greatest significance in the war against terrorism and terrorist financing:

- **Canada Border Services Agency (CBSA);**
- **Canadian Security Intelligence Services (CSIS);**
- **Communications Security Establishment (CSE);**
- **Department of Finance;**
- **Financial Transactions and Report Analysis Centre of Canada (FINTRAC);**

- **Department of Fisheries and Oceans/Canadian Coast Guard;**
- **Department of Foreign Affairs and International Trade (DFAIT);**
- **Department of Justice;**
- **Department of National Defence (DND) and the Canadian Forces (CF);**
- **Health Canada/Public Health Agency of Canada**
- **Integrated Threat Assessment Centre;**
- **Privy Council Office (PCO);**
- **Public Safety and Emergency Preparedness Canada (PSEPC);**
- **Royal Canadian Mounted Police (RCMP);**
- **Transport Canada;**
- **Canadian Air Transport Security Authority (CATSA).**

The question is to what extent do the actions of these departments and agencies assist in implementing Canada's legal framework in order to provide adequate and effective constraints on terrorist financing. The evidence heard throughout the Inquiry does not question the sincerity and good intentions of the various departments and agencies but does seriously question the resources available to some of those departments or agencies, their effectiveness and their interaction.

The Department of Finance is the lead organization in developing anti-money laundering and anti-terrorist financing policies. The Minister of Finance is responsible for the Financial Transactions and Report Analysis Centre of Canada ("FINTRAC") which was established as Canada's Financial Intelligence Unit ("FIU") under the authority of the Proceeds of Crime (Money Laundering) Act. Initially, its operation focused on the battle against money laundering. Subsequently, in 2001, terrorist financing was added to FINTRAC's mandate under the ATA. FINTRAC's primary goal is to combat money laundering and terrorist financing through the collection, analysis and disclosure of financial data provided by various reporting entities in Canada, the entities having a legal duty to report transactions where there are reasonable grounds to suspect that the transactions are related to the commission of a terrorist offence. FINTRAC's main objective is stated as follows:-

> **"to facilitate the detection, prevention and deterrence of money laundering, the financing of terrorist activities and other threats to the security of Canada, by making case disclosures of financial intelligence to the appropriate law enforcement agencies, CSIS, or other agencies covered by our legislation, while ensuring the protection of the personal information under our control"**

During the fiscal year 2005-2006, FINTRAC made 168 case disclosures involving slightly more than $5 billion in suspicious financial transactions. 33 of those disclosures

were with respect to suspicious terrorist activities and/or threats to the security of Canada. Of the $5 billion in suspicious transactions, just over $226,000,000 related to suspected terrorist financing or other threats to the security of Canada. During the fiscal year 2006-2007, FINTRAC made 193 case disclosures of which 152 were for suspected money laundering and 39 were for suspected terrorist activity. The case disclosures represented $8 billion in transactions of suspected money laundering and $209,000,000 in transactions of suspected terrorist activity financing and other threats to the security of Canada. Notwithstanding the foregoing disclosures, it appears that there have been no prosecutions with respect to terrorist financing arising from those case disclosures.

There have been serious questions raised as to the effectiveness and usefulness of FINTRAC related in large part to the adequacy of the disclosure of information, the sharing of information and the feedback with respect to information disclosed.

Exhibit P-232 included a SIRC study entitled "Review of the CSIS Investigation of Terrorist Financing Activities in Canada (SIRC Study 2004-10)". The Study noted that the battle to suppress terrorist financing was integral to the campaign against terrorism, stating:

> **"Money is the life blood of a terrorist organization. Understanding, identifying and tracking of financial structure which supports terrorist**

> **organizations is a significant factors in the overall investigation of terrorism, and the prevention of future terrorist attacks".**

The Study goes on to discuss the cooperation and exchange of information within government agencies and notes that:

> **"When FINTRAC has reasonable grounds to suspect that a transaction is related to terrorist financing activity and/or threats to the security of Canada, it is <u>required</u> to disclose information to CSIS… however the service can "voluntarily disclose" information to FINTRAC".**

The Memorandum of Evidence on Terrorist Financing submitted by the Department of Finance at Tab 3 of Exhibit P-227 references the 5-year study conducted by Ekos Research Associates evaluating Canada's anti-money laundering and anti-terrorist financing initiative which made findings that:

> **"Restrictions on the type of information FINTRAC may include in its disclosure to law enforcement and intelligence agencies can limit their usefulness. The Government of Canada shall assess the feasibility of increasing the amount of information that may be included in FINTRAC's disclosures in order to improve their value to disclosure recipients…. Communication and feedback between partners can be improved, such as providing feedback from FINTRAC to reporting entities on the usefulness of their report… performance measurement for the overall initiative needs to be strengthened, (i.e. quantitative**

data too scares to draw conclusions on the results for some aspects of the AML/ATF initiatives, including investigations). Efforts need to be devoted to assessing the capacity of the existing evaluation models in demonstrating the outcomes and costs effectiveness of the regime... A number of AML/ATF initiative partners are facing funding pressures. Notably in the area of FINTRAC's information technology capabilities, the RCMP investigator resources, and CBSA's recourse, enforcement and intelligence directorate."

The Office of the Auditor General of Canada issued a report in November of 2004 with respect to the implementation of the Canadian Government's initiative to combat money laundering. The Report stated amongst other things as follows:

"2.4 The Initiative involves a partnership among several federal organizations, law enforcement and security agencies, and industry regulators. All of these partners need to work together closely if resources are to be used effectively to detect and deter money-laundering and terrorist-financing activities. We found that while the partners interact regularly, co-operation among them could be improved.

2.5 One area where improved co-operation would help is the development of effective accountability mechanisms for the Initiative. FINTRAC collects and analyzes huge quantities of reports and other information and provides financial intelligence to law enforcement agencies and other authorities. It depends on their feedback to know how they use its disclosures and to what benefit. To date, however, not all recipients track their use of the information disclosed to them by

FINTRAC. Without a comprehensive system for monitoring the use of its disclosures, it is impossible for FINTRAC to assess the value of the intelligence it provides and how it can be made better. It is equally impossible to assess the Initiative's performance overall and its impact on money-laundering and terrorist-financing activities in Canada.

2.6 We identified a number of government actions needed to make the Initiative more effective:

- **Broaden the kinds of information that FINTRAC may disclose, within limits that respect the privacy rights of Canadians.**
- **Implement a management framework to provide direction and to strengthen the co-ordination of efforts within the federal government and with stakeholders at other levels of government and in the private sector.**
- **Establish accountability structures to ensure that the information needed for measuring the Initiative's performance is collected and that results are reported to Parliament regularly.**

…

2.22. The impact of these disclosures is hard to assess adequately, owing in part to incomplete follow-up on how they are used. Officials from law enforcement and security agencies told us that FINTRAC disclosures contributed new intelligence to ongoing investigations but rarely led to new investigations. Investigations into money laundering and terrorist financing can be complex and lengthy. At the time of our audit, no prosecutions had been launched yet as a result of FINTRAC disclosures.

2.23. The success of the Initiative depends on co-operation among not only the several federal departments and agencies involved as partners but also provincial and municipal law enforcement agencies and regulatory authorities, the financial sector, and others who are required to report. All of these partners and stakeholders need to work together closely if resources are to be used effectively to detect and deter money laundering and terrorist financing.

…

2.25. Nevertheless, at the operational level we found signs of friction, such as the following:

- **Despite the significant outreach efforts by FINTRAC over the past three years, police forces still are sometimes reluctant to share information with it and do not give much weight to unsolicited disclosures by FINTRAC.**
- **Connectivity problems between the information technology systems of FINTRAC and the Canada Border Services Agency have led to a large backlog of unprocessed reports on cross-border currency transfers.**
- **FINTRAC and the Canada Revenue Agency have yet to agree on criteria for identifying money-laundering transactions that could also be related to tax evasion.**
- **Some reporting entities told us that regulatory requirements are often announced or imposed on them without adequate appreciation of the difficulties and costs of compliance.**

…..

2.49. Yet law enforcement agencies are often reluctant to submit voluntary information reports because they are uncertain how FINTRAC will use the information. One agency told us that it hesitates to give FINTRAC information on ongoing investigations, out of concern that the investigations could be compromised. Another told us that it tends to submit voluntary information reports toward the end of an investigation, when it is about to close a file for lack of sufficient evidence. A third said that it does not submit voluntary information reports because it expects little back from FINTRAC.

2.50. Indeed, in most cases a law enforcement or intelligence agency submitting a voluntary information report hears nothing further from FINTRAC, due to the legislative restrictions on the information it can share. Of 713 voluntary information reports submitted to FINTRAC to the end of March 2004, 113 had resulted in return disclosures. In the remaining 600 cases, the agency submitting the report had no way of knowing whether FINTRAC was still working on the case or lacked meaningful additional intelligence to meet its threshold for disclosure. Unless FINTRAC has information that does meet its disclosure threshold, it simply sends nothing back. Its position is that outside of "designated information" determined to be relevant to money laundering or terrorist financing, the law prohibits any communication about the voluntary information report—not even an acknowledgement of receipt.

2.51. To a law enforcement or security agency, this situation is clearly unsatisfactory. It would like to know whether FINTRAC is working on a report that it submitted and, if so, when it might expect a related disclosure. Such knowledge would minimize the possibility of closing a

> **case prematurely on the assumption that FINTRAC had nothing to report. Or it could help the agency decide to terminate a case rather than wait for information that FINTRAC is not going to provide. In either case, valuable police time and resources would be saved. As the law now reads, however, FINTRAC is apparently prevented from communicating the status of a voluntary information report to the agency that submitted it." [Exhibit P-228]**

The Commission engaged Deloitte & Touche Forensic and Investigative Services Inc. to provide a Report with respect to the adequacy of Canada's legal framework in providing constraints on terrorist financing. That Report was presented through the evidence of Brian Tario. The Deloitte Report includes the following findings:

> **1.1.1 There is no clear differentiation between Anti-Money Laundering ("AML") and Terrorist Financing ("TF"). This is based on a lack of understanding of how terrorist organizations finance their operations. …**
>
> **…**
>
> **1.1.3 FINTRAC is viewed as the "big black hole". This is based on the fact that substantial reporting is done with little or no feedback from FINTRAC. Those interviewed would like to see more feedback from FINTRAC in terms of whether or not their reporting is assisting, is useful and is of a benefit based on the**

time, effort, energy and cost that each institution expends to comply with the legislation.

1.1.4 Of particular concern is the fact that FINTRAC has been in existence for over five years and has reported that they have identified terrorist financing activities as stated in their annual reports. The concern is that the topologies around the identification of these activities are not relayed to those required to report. The interviewees simply do not know if their institutions are being used and if so how. If they knew, all would put methodologies and policies in place to address the issues.

1.1.5 The same can be said about the RCMP and CSIS in that institutions get little, if any, feedback with respect to their efforts to assist in combating terrorist financing. There is concern that the legislation under which FINTRAC, the RCMP and CSIS operate may prohibit them from providing their important feedback. If that is in fact the case all interviewees believe it should be changed.

1.1.6 The interviewees believe that the enforcement agencies have considerable resource constraints which are having an effect on their ability to investigate those matters which have been referred by FINTRAC. This belief may be an out growth of the lack of feedback.

….

…

1.1.9 The current terrorist watch lists are seen to be ineffective in that there is little biographical data other than a person's name on the list. This creates a good deal of extra due diligence work on the part of the institutions if a name match occurs. …

…

1.1.11 The areas which were identified as being non-regulated and which could be used in terrorist financing were: the white ATM market, money service businesses, provincially regulated mortgage brokers, pre-paid credit cards, stored value cards, internet clearing houses such as Pay-Pal, internet gaming, precious metals, the legal community and the religious community. Interviewees advised that in their view, terrorists will seek the path of least resistance in the same way that money launders do in attaining their goals.

…

1.1.13 In terms of charities and not for profits the same rigour in terms of the knowing your client rules are employed by most institutions. …The interviewees also believe that the government should take a more active role in the monitoring of

> **charities and how their monies are distributed…" [Exhibit P-241]**

Jennifer Stoddart, the Privacy Commissioner, testified as to the Office of the Privacy Commissioner's concerns as to whether a clear and compelling case had been made for the expansion of Canada's anti-money laundering and terrorist financing regime. She stated in her Report as follows:

> **"While the Office has closely monitored the debate, we had never been privy to a clear estimate of the problem size, nor do we know the current regime is an effective deterrent. After reviewing recent Committee appearances of officials from the Department of Finance, Justice, Public Safety and FINTRAC, precise figures on prosecutions or overall trends remain allusive…. As the Office of the Auditor General stated in its 2003 Report to Parliament, "there are no reliable estimates of either the extent or impact of money laundering in Canada… estimates that are frequently used in Canada and internationally should be viewed with a degree of skepticism." Without reliable data on the extent of this activity, subsequent analysis and debate has often been equally vague and hypothetical."**
>
> **[Exhibit P-278, Tab 5]**

The Commission of Inquiry into The Actions of Canadian Officials in Relation to Maher Arar addressed what it referred to as "**issues arising from the fact that many different federal entities are involved in the area of national security and the need for integrated or coordinated review**". In its Report, the Arar Commissioner, as a result of the policy review process and observations made during the course of the factual inquiry of the Arar Commission, reached the following conclusion:

> **"(i) The government should extend independent review to the national security activities of the CBSA, CIC, Transport Canada, FINTRAC and DFAIT.**
>
> **(ii) ICRA is the most appropriate body to review the CBSA, given the latter's important law enforcement mandate.**
>
> **(iii) SIRC is the most appropriate body to review the national security activities of the other four entities.**
>
> **(iv) In five years' time, the government should appoint an independent person to conduct a review of the effectiveness of the review of the federal government's national security activities and to determine whether there are other federal government agencies or departments that, by virtue of their national security mandate, should also be subject to independent review."**

The Arar Commissioner goes on in that Report to state:

> **"It is precisely because the CBSA, CIC, Transport Canada, FINTRAC and DFAIT have the power to significantly affect the lives and rights of individuals, because their national security activities are not transparent, and because their activities are integrated with both CSIS and the RCMP, that the question of accountability is so important. Unless an independent, national security review body has the ability to make findings and recommendations about these agencies, the goals of national security review will be compromised. These are the five federal entities other than CSIS, the RCMP and the CSE whose national security activities have the greatest potential to intrude on the lives of individuals and that, accordingly, require the greatest degree of accountability…**
>
> **…I have come to the conclusion that the national security activities of CIC, Transport Canada, FINTRAC and DFAIT should be reviewed by SIRC…" [Exhibit P-234]**

As the Commission reviewed and heard evidence with respect to the legislative and regulatory framework and the various Reports and Studies, some of which are discussed above, it heard the testimony of many witnesses from the various departments and agencies involved in the war on terrorist financing. It is submitted that the evidence of those witnesses, read in conjunction with the various Reports and Studies, raise serious issues with respect to the adequacy of the constraints on terrorist financing. In particular, questions arise with respect to the adequacy of the exchange of information and feedback and the lack of any review mechanisms of the various departments and agencies to determine their effectiveness.

Professor Passas stressed the need to increase the feedback given to private industry and the enhancement of communication between the public sector and the private sector. He stressed the need to have appropriate resources for community policing so that risk assessments could be made in order to assist in the proper focus of resources and the need to coordinate intelligence gathering with police investigations. Given the many ways in which terrorists can move funds, he emphasized the need to use intelligence agencies to assist agencies such as FINTRAC properly apply their resources.

John M. Schmidt, of ITAC, and Superintendant Rick Reynolds, Officer-in-Charge of the National Security Crimination Operations Branch, RCMP, both spoke of the need for and lack of disclosure and communication between agencies and in particular FINTRAC. Reynolds agreed with the finding of Ekos Research Associates that "**restrictions on the type of information FINTRAC may include in its disclosures to law enforcement and intelligence agencies can limit their usefulness. The Government of Canada should assess the feasibility of increasing the amount of information that may be included in FINTRAC's disclosures … such as providing feedback for FINTRAC to reporting entities on the usefulness of their reports**". [Pages 6887-6888 Transcript of Hearings]

Mark Potter and Janet DiFrancesco testified on behalf of FINTRAC with respect to the role that FINTRAC played in the terrorist financing scheme. They agreed that FINTRAC

does not have a process in place to obtain feedback from agencies to which case disclosures have been provided and that getting feedback would assist in improving the quality of a case disclosures and would also contribute to the overall morale of FINTRAC staff.

Detective Inspector Paul Newham of the National Terrorist Financial Investigation Unit at New Scotland Yard testified as to the success of the British approach in the open sharing of information between the various agencies involved in the war on terrorist financing. He testified with respect to the feedback between agencies and the interrelationship of the agencies with respect to the flow of information and feedback. Further, he testified with respect to the flow of information between the various agencies and the private sector so that those involved in the private sector are aware of the utility of the information being provided.

The Report of Brian Tario of Deloitte was discussed above. In his evidence, Mr. Tario stressed the need for a more "risk-based" approach rather than a "rule-based" approach which requires better and more information coming back from the Government agencies so that the individuals involved in the public sector can understand the typologies they should be looking for. He also testified as to requiring greater feedback between FINTRAC and the RCMP and CSIS.

Denis Vinette, David Quartermain and Tyson George provided evidence on behalf of the Canada Border Services Agency ("CBSA") and testified with respect to the role that CBSA played in the fight against terrorist financing and the positive result of the efforts of CBSA in that regard. However, they acknowledged that there is no audit procedure in place to monitor and test the activities of front line personnel i.e. the use of training bags or dummy packages. They acknowledged as well that there are no quality control procedures in place with respect to the day to day operations although there is on-going and regular training.

Terry de March, Donna Walsh and Maurice Klein gave evidence with respect to the Canada Revenue Agency's Charity Directorate ("CRA"). As charitable organizations have long been suspected and been publicly accused of being among the many instruments used by terrorist financing activities, the role of CRA is to analyze data, including intelligence assessment briefs and other information, provided by the RCMP and CSIS and other agencies, in order to identify charities that may be involved with or support terrorist groups. The CRA uses the information to determine whether organizations that seek to be charities can register or retain their status as charities under the *Income Tax Act*. Amendments to the Anti-Terrorist Act by virtue of Bill C-25 permit CRA to disclose information to the RCMP, CSIS and other agencies with respect to suspected terrorist activities.

Under the Charity Registration (Security of Information) Act ("CRSIA"), the Minister of National Revenue can act to deregister or prevent the registration of any charity when they have reasonable grounds to believe that the charity is making resources directly or indirectly available to terrorist groups.

The witnesses conceded that there is no auditing or independent review of financial statements submitted by charities. They also acknowledged that it would be helpful to have feedback from policing authorities with respect to the information provided to them.

Ron Townshend, Registrar of the British Columbia Registry Services, testified that an organization could call itself a charity although it was really an non-profit organization and avoid the scrutiny of the CRA. He, as other witnesses did, recognized the distinction between charities and non-profit organizations and the fact that non-profit organizations are not monitored as charitable organizations are.

The Recommendation of FATF, as part of his Special Recommendations on terrorist financing stated that "**countries should review the adequacy of laws and regulations that relate to entities that can abused for the financing of terrorism. Non-Profit organizations are particularly vulnerable, and countries should ensure that they cannot be misused…"**. [Exhibit P-225 – Tab 16, page 2]

Mr. Townsend testified that he had never been approached by anyone involved in the anti-terrorist initiative in Canada to discuss what should be done, if anything, with respect to non-profit organizations that do not have charitable status. The involvement of provincial non-profit organization regulators in the fight against terrorist financing is critical but to date appears to have overlooked.

Kenneth Dibble of the Charities Commission, U.K., gave evidence as to a different approach whereby the Charities Commission in the U.K. has the ability and power to conduct covert intelligence where there is a belief there is a serious concern with respect to a charity and the interaction with policing and intelligence authorities with respect to its investigations. The Charities Commission is able not only to proactively monitor charities and engage in covert intelligence gathering but also has the power to intervene into the operations of a charity and take remedial action to identify and resolve problems in charities linked to terrorist activities. In the U.K., the trustees of charities are accountable for the misapplication of funds and, at certain level, there is a requirement of an independent review or audit of financial statements.

Professor Mark Sidel in wrote in his Report [Exhibit P-321] at Tab 5, page 28, after reviewing the Charity Regulator in the United Kingdom, the United States and Australia, that:

> **"In my view the British approach may have worked more effectively in the years since 2001. The British case studies discussed above**

demonstrate that the Charities Commission employs a broad range of investigative and regulatory responses to concerns that charities have links with terrorism. Not all of the regulatory responses are punitive and can include requiring include record keeping and other measures that make it easier to detect links with terrorists in the future."

Mark Sidel noted that Canada, the United States and Australia do have a constitutional obstacle by reason of being federal governments. However, it is submitted that it is in the interest of the federal government and the provincial governments to cooperate and act jointly in establishing an effective scheme for the regulation of charities and other non-profit organizations.

Professor David Duff of the University of Toronto, noted that there were 82,000 charities in Canada, most of them being small organizations, and that it is necessary to make them partners or allies in the fight against terrorism. He stressed the need for the provinces to play a role in the regulation of charities and non-profit organizations and the need for the federal and provincial government to work together in that regard. He favoured the approach of the Charities Commission in the United Kingdom as it was more proactive in regulating, governing and helping charities and created a greater degree of trust within the charitable sector. He concluded in this Report [Exhibit P-322] that the federal and provincial governments should cooperate to establish a more robust regulatory response extending to organizations that do not apply for charitable status.

It is submitted that on the whole of the evidence, it appears that charities are not the instrument of terrorist financing to the degree feared. It also appears that the existing legislative and regulatory framework governing charities is inadequate and fails totally with respect to non-profit organizations which are not charities.

The Canadian Government has imposed a legal and regulatory regime through legislation and through the empowering of various government agencies and departments with the intent of placing constraints on terrorist financing. The action of the Canadian Government is in accordance with international standards. However, it is submitted that the evidence raises serious concerns as to the adequacy of the constraints placed on terrorist financing.

Professor Anita Anand of the University of Toronto, presented her paper "**An Assessment of the Legal Regime Governing the Financing of Terrorist Activities in Canada**" [Exhibit 323]. Professor Anand's Study recognizes the deficiencies in the system as was evident from the evidence of the various witnesses who appeared before the Commission. In her Report, she states:

> **"The difficulty with the contemporary regime lies not in conspicuous gaps in the substantive of law, but rather in knowing whether the**

regime is effective in fulfilling its stated objectives of preventing and disrupting the funding of terrorists.

This study focuses on the need to assess the current anti-terrorist financing regime and ensure that its infrastructure functions effectively. First, it suggests that a formal and full fledged assessment of the efficacy of the current regime be undertaken. Second, it suggests that consideration be accorded as to whether a body that oversees and monitors the functions of FINTRAC should be created. Third, in the same vein, it suggests that studies be undertaken on the issue of whether a larger oversight body is necessary, one that oversees not only the activities of FINTRAC, but also other institutions that bear responsibility for enforcing the terrorist financing laws, such as the RCMP and CSIS."

Professor Anand reviewed the U.S. Patriot Act and noted the recognition of the requirement of a cooperative effort between the private and the public sector and that the Patriot Act explicitly provides for cooperation amongst financial institutions, regulatory authorities and law enforcement in general relating to the financing of terrorist groups including through the use of charities and non-profit organizations. She noted that the Canadian regime does not appear to adequately address information sharing or legally require cooperation between organizations and agencies.

Professor Anand also discussed the U.S. Office of Terrorism and Financial Intelligence (OTFI) which was created in 2004 to consolidate the policy, enforcement, regulatory and international functions of the U.S. Treasury in the area of terrorist financing. The OTFI gathers and analyzes its information from the intelligence, the law enforcement and the financial community in order to identify and take action with respect to terrorist financing. Professor Anand notes that Canada does not have a coordinating body that oversees the efforts of the various entities and the role that they play in the fight against terrorist financing. Professor Anand observes that "**there has been no concerted and comprehensive effort towards determining whether the current legislative regime is effective in preventing terrorism and the cost and benefits inherent to the regime**." She discusses the recent Senate Banking, Trade and Commerce Committee's concerns in their review of FINTRAC that the legal regime might be more effective if there were a two-way flow of information between FINTRAC and law enforcement and intelligence agencies as well as between FINTRAC and the financial entities that report to it.

Professor Anand concludes in her Report:

> **"The Canadian regime that governs the financing of terrorism is relatively new – it has been in existence for less than a decade. It is difficult to know at this time whether the regime has been and is effective in combatting of the financing of terrorism. However, this is not to say that the regime is ineffective. Rather, before new law is**

> **implemented, an assessment of the efficacy and efficiency of the current regime is required. This assessment would be a first step towards understanding whether (and where) additional laws are necessary."**

It is apparent that before the question as to whether or not Canada's existing legal framework provides adequate constraints on terrorist financing can be answered, it is necessary to conduct an overall review of the policies, procedures, and activities of the various agencies and bodies to determine whether the constraints placed by the legislative framework are effective and adequate. Having regards to the above, the Indian Nationals submit the following **RECOMMENDATIONS**:

1. **That the Canadian Government appoint an independent body to conduct a cost-benefit analysis and regulatory impact assessment with respect to the effectiveness of the current legislative framework and the various departments agencies functioning within that framework in order to determine whether or not the framework is effective in the prevention of terrorist financing, whether adequate resources have been committed to the war against terrorist financing and if those resources are being properly implemented.**

2. **That the Canadian Government appoint a terrorist financing oversight body to oversee and coordinate the efforts of the various departments and agencies that play a role in the monitoring, detection and prevention of terrorist financing to ensure that the agencies and bodies are accountable, and, in addition, in order to ensure that all of the partners involved in the war against terrorist financing are aware of the use being put to the information being gathered and disclosed and the impact of that information and disclosure on the prevention of the terrorist financing.**

3. **That a management framework be established to direct and strengthen the coordination efforts made between the various departments and agencies and the private sector in order to enhance the extent of information sharing, collaborative effort and feedback between the various departments and agencies and the private sector.**

4. **That the approach with respect to the monitoring, detection and prevention of terrorist financing be a "risk-based" approach rather than a "rules-based" approach necessarily involving a greater degree of collaboration between the policing and intelligence communities, the various department and agencies and the private sector.**

5. **That with respect to charities and non-profit organizations the Canadian Government appoint an independent body to undertake a review of the adequacy of the legal framework as it exists with respect to charitable and non-profitable organizations.**

6. **That the Canadian Government engage provincial regulatory authorities with respect to charities and non-profit organizations in order to develop a coordinated and effective strategy.**

7. **That the Canadian Government, in conjunction with the provincial regulatory authorities, adopt the approach of the Charities Commission of the U.K. with respect to charities in order to provide a broad range of investigative and regulatory responses.**

The Indian Nationals submit that it is not sufficient to be seen as doing the right things to prevent terrorist financing. It must be determined and ensured that the Canadian Government is in fact effectively constraining the use or misuse of funds for terrorist financing.

Thank you for considering these submissions and recommendations.