

2010

# Charities and Terrorist Financing

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## Citation Details

David G Duff, "Charities and Terrorist Financing" (2010) 61:1 UTLJ 73.

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# Charities and Terrorist Financing

David G. Duff\*

## Introduction

A decade after the bombing of Air India Flight 182 in June 1985, many Canadians were shocked to learn that the Babbar Khalsa Society – a militant organization dedicated to the establishment of an independent state in northern India, members of which are believed to have planned the Air India bombing – had been granted charitable status in Canada.<sup>i</sup> Although the organization’s charitable status was revoked in 1996,<sup>ii</sup> reports also suggested that funds collected to support Sikh temples in Canada may have been diverted to support Sikh militancy in India.<sup>iii</sup> Concerns have also been raised about the role of other charitable organizations in terrorist financing – for example the Benevolence International Fund, an organization with links to al-Qaeda that was designated as a financier of terrorism by the U.S. Treasury Department in November 2002.<sup>iv</sup> And in, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) reported that one third of its case disclosures related to “terrorist financing and other threats to the security of Canada” involve non-profit organizations.<sup>v</sup> Not surprisingly, therefore, when the federal government established a Commission of Inquiry into the Investigation of the

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Bombing of Air India Flight 182 (Air India Inquiry), the Commission's Terms of Reference asked it, among other things, to make findings and recommendations regarding "whether Canada's existing legal framework provides adequate constraints on terrorist financing" through "the use or misuse of funds from charitable organizations."<sup>vi</sup>

In its Final Report,<sup>vii</sup> however, the Commission made no formal recommendations on charities and terrorist financing, despite a detailed chapter on the subject contained in a lengthy volume on terrorist financing.<sup>viii</sup> This is unfortunate, given the time and effort devoted to the Inquiry, but perhaps partly understandable given a number of changes over the past decade that have significantly improved Canada's legal framework to constrain the use or misuse of charitable organizations for terrorist financing.<sup>ix</sup> At the same time, continuing deficiencies in this legal framework suggest that the absence of any formal recommendations on the subject in the Commission's Final Report was a missed opportunity.

This article examines the relationship between charities and terrorist financing in Canada, reviewing Canada's legal framework in order to evaluate its adequacy to limit the use or misuse of charitable organizations for terrorist financing. This evaluation is based on two important considerations. First, as experience with the Babbar Khalsa Society and Sikh temple funds sadly demonstrates, effective supervision and regulation of charitable organizations is essential to prevent their manipulation by individuals and groups who seek to exploit the legitimacy and fiscal benefits that these organizations enjoy in order to finance terrorism. Second, as many charities are small organizations with unpaid volunteers and very few have any connection with terrorist activities, charities should generally be viewed as allies in the struggle against terrorism rather than

suspects. As a result, government supervision and regulation of the charitable sector should be proportionate and risk-based – emphasizing capacity-building and best practices to prevent the use or misuse of charitable organizations for terrorist financing, ensuring transparency and self-regulation to the greatest extent possible, scrutinizing transactions and organizations that pose the greatest risks for terrorist links, and limiting more serious regulatory sanctions to the rare instances where charities provide support to terrorist organizations.

The article proceeds as follows. Part I reviews the constitutional framework governing the establishment and regulation of charities in Canada, considering the respective powers of the federal and provincial governments and the effect of this constitutional division of powers on the regulation of charities in Canada. Part II outlines the legal and administrative framework governing registered charities under the federal *Income Tax Act* and related legislation,<sup>x</sup> explaining key legal rules and administrative practices affecting their status and operations, as well as the supervisory and regulatory role performed by the Canada Revenue Agency. Part III examines the collection and sharing of information on charitable organizations for the purpose of administering federal legislation regarding charitable status as well as other measures to prevent terrorist financing. Part IV evaluates Canada’s existing legal framework for constraining terrorist financing through charitable organizations, reviewing the adequacy of this framework in light of limits on federal jurisdiction over charities and the recent introduction of more flexible compliance-based approaches to charities regulation. Part V concludes that amendments to Canada’s legal framework over the last ten years have greatly reduced the likelihood that terrorist organizations might be able to obtain

charitable status or misuse existing charities for terrorist financing, but that further reforms should be introduced both to further reduce this possibility and to minimize interference with legitimate charitable activities.

## **I. Constitutional Framework Governing Charities in Canada**

According to subsection 92(7) of the *Constitution Act, 1867*,<sup>xi</sup> provincial legislatures in Canada are granted exclusive authority to make laws in relation to: “The Establishment, Maintenance, and Management of ... Charities, and Eleemosynary Institutions in and for the Province.” In addition, provinces have exclusive jurisdiction over “Property and Civil Rights in the Province”<sup>xii</sup> – allowing them to regulate the transfer and use of property for charitable purposes. Federal jurisdiction over charities, on the other hand, is limited to the incidental powers that the Parliament of Canada derives from its taxation power.<sup>xiii</sup> To the extent that the ITA confers special tax benefits on charities and their contributors, supervision and regulation of charities in order to ensure that they satisfy the terms on which these benefits are conferred constitutes a legitimate exercise of this federal power. While provincial governments have broad powers to regulate charities and charitable property, therefore, federal jurisdiction to supervise and regulate charities is limited to conferral of fiscal benefits under the ITA.

Notwithstanding their constitutional authority to regulate charities and charitable donations, most provinces have either chosen not to exercise this jurisdiction,<sup>xiv</sup> or have done so only sparingly.<sup>xv</sup> Although a few provinces have enacted legislation regarding charitable fundraising,<sup>xvi</sup> and provincial Attorneys-General have the right and duty to supervise and assist charities under their *parens patriae* jurisdiction as representatives of

the Crown,<sup>xvii</sup> only Ontario has enacted specific legislation regulating the operation of charitable organizations and the use of charitable property in the province.<sup>xviii</sup> As a result, as Patrick Monahan and Elie Roth observe in their study on *Federal Regulation of Charities*, “the federal government, though the scheme of regulation enacted for charities pursuant to the *Income Tax Act* (“ITA”), has *de facto* assumed the dominant regulatory role in this sector.”<sup>xix</sup>

Since federal jurisdiction over charities extends only to the conferral of fiscal benefits under the ITA, however, this regulatory role is much more limited than might be exercised under provincial jurisdiction. In Ontario, for example, the *Charities Accounting Act* grants the Public Guardian and Trustee and the Superior Court of Justice broad supervisory powers over charities operating in Ontario, including the power to remove trustees or executors and appoint other persons to act in their place.<sup>xx</sup> Such extensive supervisory powers are unavailable at the federal level, absent provincial delegation to a federal body or the establishment of a joint federal-provincial agency.<sup>xxi</sup>

Moreover, because federal jurisdiction over charities is incidental to its taxing power, federal regulatory efforts in this area have tended to emphasize monitoring and investigation in order to assess eligibility for tax benefits, rather than advice and support in order to assist charities to carry out their activities in a manner consistent with their legal obligations and charitable purposes.<sup>xxii</sup> While recent federal initiatives have placed increased emphasis on advice and support, for example through a Charities Partnership and Outreach Program that funds education and training programs for registered charities,<sup>xxiii</sup> these initiatives focus mainly on compliance with the ITA.<sup>xxiv</sup> Together with the recent introduction of various “intermediate” penalties and sanctions in addition to

the ultimate punishment of revocation,<sup>xxv</sup> however, these initiatives signal a major shift in the federal government’s regulatory approach to the charitable sector from a traditional emphasis on the enforcement of inflexible rules to a more responsive approach aimed at encouraging compliance.<sup>xxvi</sup>

## **II. Legal and Administrative Framework Governing Registered Charities**

As explained in the previous Part of this paper, the sole reason for federal supervision and regulation of charities is to ensure that they satisfy the terms on which fiscal benefits are conferred under the ITA. The following sections explain the legal framework governing registered charities under federal legislation, reviewing the fiscal benefits that the *Income Tax Act* (“ITA”) confers on charities and their contributors, the statutory and judicial tests that an organization must satisfy in order to register for charitable status under the ITA, the legal and administrative requirements that a registered charity must fulfill in order to maintain this status, the penalties and sanctions that the ITA imposes on charities that fail to comply with these requirements, and additional legal requirements under the *Charities Registration Security Information Act* (“CRSIA”) enacted after the terrorist attacks of September 11, 2001.

### **1. Fiscal Benefits**

Charitable status confers two fiscal benefits under the ITA. First, like many other organizations, such as non-profit organizations, registered charities are exempt from tax on their income.<sup>xxvii</sup> Second, qualifying gifts to registered charities are eligible for further tax benefits in the form of a non-refundable credit for individual donors,<sup>xxviii</sup> a deduction for corporate donors,<sup>xxix</sup> and an exemption from capital gains tax on gifts of publicly-

traded securities and ecologically sensitive land.<sup>xxx</sup> While these tax benefits for qualifying gifts are not available for donations to non-profit organizations, they are available for qualifying gifts to other entities such as registered Canadian amateur athletic associations, low-cost housing corporations, Canadian municipalities, the United Nations, and Her Majesty in right of Canada or a province.<sup>xxx</sup> Collectively, the ITA defines these entities as “qualified donees”.<sup>xxxii</sup>

Although various rationales may be advanced in favour of these tax provisions,<sup>xxxiii</sup> they are generally viewed as incentives or “tax expenditures” that are designed to provide an indirect subsidy to registered charities and other qualified donees by encouraging individuals and corporations to make donations to these entities. A subsidy for these entities is generally justified on the grounds that they provide public benefits that would otherwise be undersupplied, and perform quasi-governmental functions that would otherwise have to be financed directly from tax revenues.<sup>xxxiv</sup> The indirect form of this subsidy in the form of a tax incentive is often favoured as a more pluralistic method of subsidizing these activities than direct subsidies – allowing donors to select the organizations and purposes to which they wish to direct public subsidies without having to obtain the agreement of a political majority.<sup>xxxv</sup> The Federal Department of Finance estimates the annual cost of these incentives in terms of foregone revenues to be approximately \$3 billion.<sup>xxxvi</sup>

## **2. Obtaining Registered Charitable Status**

Although the federal income tax has provided fiscal benefits of one sort of another to charities since it was first enacted in 1917,<sup>xxxvii</sup> it was not until 1967 that the federal government established a registration system for Canadian charities, requiring all



organizations issuing charitable receipts for qualifying gifts to apply for and maintain registered status under the ITA.<sup>xxxviii</sup> Since then, federal revenue authorities have exercised primary supervisory and regulatory authority over Canadian charities through their authority to grant or revoke the organization's status as a registered charity.<sup>xxxix</sup> As of 2007, over 83,000 charities were registered with the CRA,<sup>xl</sup> representing roughly half of all nonprofit and voluntary organizations in Canada.<sup>xli</sup> Most of these organizations have annual revenues less than \$100,000,<sup>xlii</sup> and many rely on unpaid volunteers.<sup>xliii</sup>

In order to obtain charitable status under this registration system, an organization must satisfy statutory requirements under the ITA, judicial tests governing the meaning of a "charitable" purpose or activity, and administrative requirements adopted by the CRA. Beginning with statutory requirements under the ITA, subsection 248(1) defines a "registered charity" as a charitable organization, private foundation or public foundation (or division thereof) that is resident in Canada and was either created or established in Canada, provided that it has "applied to the Minister in prescribed form for registration, and is at that time registered as a charitable organization, private foundation or public foundation". For the purpose of this definition, Form T2050 is prescribed as the form through which an application for charitable status must be made, and subsection 149.1(6.3) stipulates that the Minister of National Revenue may, by notice sent by registered mail to the registered charity, designate the charity to be a charitable organization, private foundation or public foundation, whereupon "the charity shall be deemed to be registered as a charitable organization, private foundation or public foundation, as the case may be, for taxation years commencing after the day of mailing of the notice unless and until it is otherwise designated ... or its registration is revoked ..."

The meanings of the terms charitable organization, private foundation and public foundation appear in section 149.1 of the ITA, which contains further statutory rules governing the acquisition and maintenance of charitable status. According to subsection 149.1(1), a charitable organization means an organization, whether or not incorporated,

(a) all the resources of which are devoted to charitable activities carried on by the organization itself,

(b) no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, [and]

(c) more than 50% of the directors, trustees, officers or like officials of which deal with each other and with each of the other directors, trustees, officers or officials at arm's length ...

while a “charitable foundation” means

a corporation or trust that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization.

Where most of the officials of a charitable foundation deal with each other at arm's length and no more than 50% of the foundation's capital was contributed by a single person or by members of a group who do not deal with each other at arm's length, the ITA classifies the foundation as a “public foundation”; otherwise, the charitable foundation is classified as a “private foundation”.<sup>xliv</sup>

While the distinction between a public and private foundation turns on the extent to which it is controlled by a single person or related group, the distinction between a charitable organization and a charitable foundation generally turns on the manner in which they engage in charitable pursuits. As a general rule, charitable organizations must devote their resources to “charitable activities” that they themselves carry on.<sup>xlv</sup> As an administrative practice, moreover, the CRA recognizes as charitable activities carried on by a registered charity any charitable activity that is carried on outside Canada through

an intermediary such as an agent, a contractor or other body.<sup>xlvi</sup> In contrast, charitable foundations are merely required to operate for “charitable purposes” – a term which the ITA specifically defines to include “the disbursement of funds to qualified donees”.<sup>xlvii</sup> In general, therefore, charitable organizations engage in charitable activities themselves or through intermediaries, while charitable foundations operate for charitable purposes by disbursing funds to charitable organizations and other qualified donees.

Notwithstanding these differences between charitable organizations and charitable foundations, the ITA requires both types of registered charity to be “exclusively charitable” – devoting “all” of their “resources” to charitable activities in the case of charitable organizations, and operating “exclusively” for charitable purposes in the case of charitable foundations. Where a charitable foundation or organization devotes “substantially all of its resources” to charitable purposes (in the case of a charitable foundation) or charitable activities carried on by it (in the case of a charitable organization), however, subsections 149.1(6.1) and (6.2) permit the charity to devote part of its resources to “political activities” provided that they are “ancillary and incidental” to the foundation’s purposes or the organization’s activities and “do not include the direct or indirect support of, or opposition to, any political party or candidate for public office”. More generally, judicial decisions have held that the pursuit of purposes that are not themselves charitable, but “incidental to” or “a means to the fulfillment of” other charitable purposes” will not deprive an organization or foundation of charitable status.<sup>xlviii</sup>

Since the ITA does not, aside from these provisions, define the terms “charitable activities” and “charitable purposes”, Canadian courts have generally sought guidance in

the common law of trusts, which admits charitable purpose trusts as an exception to the general rule that a purpose trust is invalid. Although the definition of a charitable organization mentions charitable activities, not purposes, the Supreme Court of Canada has downplayed the distinction, stating that “it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity, that determines whether or not it is of a charitable nature.”<sup>xlix</sup> Where an organization is established for a charitable purpose, however, the Court has also emphasized that it is necessary to consider the activities carried on by the organization in order to ensure that they are “in furtherance of” the charitable purpose.<sup>l</sup>

The traditional starting point for judicial interpretations of charitable purposes is Lord Macnaghton’s statement in *Commissioners for Special Purposes of the Income Tax v. Pemsel*,<sup>li</sup> that:

“Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

In adjudicating appeals by groups that have been denied charitable status in Canada, the Supreme Court of Canada has shown considerable reluctance to expand the categories of charitable organizations beyond those traditionally recognized under the *Pemsel* test.<sup>lii</sup>

Superimposed on these categories, is a further requirement that the purpose of the trust must be “[f]or the benefit of the community or of an appreciably important class of the community.”<sup>liii</sup> On the basis that judges cannot and/or should not determine whether a proposed change in the law is for the public benefit,<sup>liv</sup> moreover, the courts and revenue authorities have traditionally denied charitable status where the activities or purposes of

the organization or foundation advocate social change or promote a particular ideological outlook.<sup>lv</sup>

Consistent with these statutory requirements and judicial tests, registration as a charitable organization or foundation by the CRA depends on a determination that the applicant is “constituted and operated exclusively for charitable purposes” under one of the four *Pemsel* categories,<sup>lvi</sup> that it satisfies the public benefit test,<sup>lvii</sup> and that none of its purposes is political.<sup>lviii</sup> For this purpose, the prescribed form that applicants for charitable status must submit (Form T2050) requires them to identify the name and mailing address of the organization, its directors or trustees, its organizational structure, its programs and activities, financial information, and confidential information concerning the organization’s business address or physical location, the physical location of books and records, the name and address of an authorized representative, contact information for directors or trustees, and financial statements for organizations that have operated for more than a year before applying for charitable status.<sup>lix</sup>

In the leading judicial decision on this issue, the Federal Court of Appeal characterized the registration of charities as a “strictly administrative function,”<sup>lx</sup> concluding on this basis that there is no obligation on the Minister to notify the applicant and invite representations or conduct a hearing before refusing its application for charitable status.<sup>lxi</sup> Notwithstanding this conclusion, the current administrative practice of the CRA is to send the applicant an Administrative Fairness Letter (AFL) explaining the reasons for denying charitable status, whereupon the applicant is given 90 days to respond.<sup>lxii</sup> Only if the applicant either does not respond or fails to respond satisfactorily to the AFL, does the CRA issue a Final Turn Down (FTD) letter refusing registered

status.<sup>lxiii</sup> Where an applicant has received a FTD letter, recent amendments to the ITA give the applicant 90 days to file a notice of objection with the Appeals Branch of the CRA,<sup>lxiv</sup> which is required to assess the matter “with all due dispatch”.<sup>lxv</sup> Where the Appeals Branch decides to uphold the decision to deny registration, the applicant must be notified by registered letter,<sup>lxvi</sup> and is given 30 days to file a notice of appeal to the Federal Court of Appeal.<sup>lxvii</sup> The number of such appeals is minimal.<sup>lxviii</sup>

In recent years, the number of new applicants for registered charitable status has been approximately 3,000 to 3,700 per year, while the number of registrations each year has been in the range of 2,300 to 3,100. As Table 1 illustrates, most cases in which applicants are not registered are attributable to abandoned or withdrawn applications rather than formal denials, though the number of denials increased significantly in 2007 after the CRA made an administrative decision to issue FTD letters to applicants who had not responded to an AFL within 90 days.<sup>lxix</sup>

**Table 1: Charities Applications and Registrations, 2002-2008<sup>lxx</sup>**

Year	New applications	Applications to re-register	Total applications	Administrative Fairness Letters	Denials	Registrations (%)
2002	3,017	540	3,557	1,054	56	2,281 (64.1)
2003	3,207	468	3,675	515	33	2,774 (75.5)
2004	3,043	445	3,488	482	19	2,592 (74.3)
2005	3,449	527	3,976	433	35	3,117 (78.4)
2005-06	3,734	n/a	n/a	n/a	52	2,926 (n/a)
2006-07	3,601	n/a	n/a	n/a	326	2,469 (n/a)
2007-08	3,655	606	4,261	n/a	307	2,345 (55.2)

In percentage terms, the number of registrations as a share of total applications increased from 64.1 percent in 2002 to 78.4 percent in 2005, but has fallen more recently to 55.2 percent in 2007-08. As Table 2 indicates, the percentage of applicants obtaining registered status in 2002 is comparable to the registration rate prevailing in the late 1990s, while the percentage of applicants obtaining registered status in 2003 to 2005 is

closer to the registration rate in the early 1990s, and the percentage of applicants obtaining registered status in 2007-08 is lower than reported figures for any other year in the 1990s and 2000s.

**Table 2: Charities Applications and Registrations, 1992-1999<sup>lxxi</sup>**

Year	Total applications	Registrations	Registration Rate (%)
1992-93	3,900	3,300	84.6
1993-94	4,400	3,350	79.5
1994-95	3,900	3,300	84.6
1995-96	5,000	4,500	90.0
1996-97	4,300	2,800	65.0
1997-98	4,800	3,000	62.5
1998-99	4,100	2,750	67.0

According to the CRA, the principal reasons for the denial of registrations in 2006-07 were broad/vague objects, lack of information and non-charitable activities.<sup>lxxii</sup> Between 2001 and 2007, however, the CRA also reports that charitable status was denied in fourteen cases in which the applicant had some terrorist connection.<sup>lxxiii</sup> The RCMP has also reported that three organizations were denied registration in 2005-06 on account links to terrorist activities or groups.<sup>lxxiv</sup>

### **3. Maintaining Charitable Status**

Once they are registered, charitable organizations and foundations are subject to several further requirements in addition to the basic requirement that their activities or purposes remain charitable under the legal test set out in the *Pemsel* case. According to subsection 149.1(14), registered charities must file an annual information return within 6 months of the end of their taxation year, containing sufficient information to enable the CRA to assess their activities. This return and accompanying worksheets require the

charity to provide information on the charity's governing documents, directors or trustees, programs and activities, employee compensation, other financial information (assets, revenue and expenditures, including gifts to other qualified donees), and confidential information concerning the charity's physical location, the physical location of books and records, and the name and address of the person who completed the return.<sup>lxxv</sup>

In addition to this annual reporting obligation, subsection 230(2) of the ITA imposes a further administrative requirement on registered charities to keep "records and books of account" at an address in Canada containing:

- (a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of registration under this Act;
- (b) a duplicate of each receipt containing prescribed information for a donation received by it; and
- (c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

Where a charity fails to maintain adequate records and books of account, moreover, subsection 230(3) stipulates that "the Minister may require the person to keep such records and books of account as the Minister may specify, and that person shall thereafter keep records and books of account as so specified."

In addition to these reporting and record-keeping requirements, registered charities must also refrain from engaging in various commercial activities,<sup>lxxvi</sup> and must satisfy a "disbursement quota" for expenditures on charitable activities or gifts to other qualified donees.<sup>lxxvii</sup> According to paragraphs 149.1(2)(a), 149.1(3)(a) and 149.1(4)(a), charitable organizations and public foundations may not carry on any business that is not a "related business" of the charity, while private foundations are prohibited from carrying on any business altogether. For the purpose of these provisions, the ITA defines a



“business” quite broadly to include *inter alia* an undertaking of any kind whatever,<sup>lxxviii</sup> and judicial decisions have suggested that a related business must be closely connected to the activities or purposes of the charity and devote its moneys exclusively to these charitable activities or purposes.<sup>lxxix</sup> According to paragraphs 149.1(2)(b), 149.1(3)(b) and 149.1(4)(b), and the definition of “disbursement quota” in subsection 149.1(1), registered charities are generally required to spend on charitable activities or gifts to other qualified donees at least 80 percent of the amount of received gifts from the previous year (the “charitable expenditure rule”) as well as 3.5 percent of assets exceeding \$25,000 that are not currently used in charitable programs or administration (the “capital accumulation rule”).<sup>lxxx</sup> Finally, paragraphs 149.1(3)(c) and 149.1(4)(c) stipulate that charitable foundations may not acquire control of any corporation, while paragraphs 149.1(3)(d) and 149.1(4)(d) state that charitable foundations may not incur debts, other than “debts for current operating expenses, debts incurred in connection with the purchase and sale of investments and debts incurred in the course of administering charitable activities”.

#### **4. Penalties and Sanctions**

Until 2005, the only statutory remedy to deal with registered charities that failed to comply with the statutory and judicial requirements for maintaining their charitable status was revocation of this status. According to ITA subsection 168(1), the Minister may issue a notice of revocation where, among other circumstances, the registered charity:

- (a) applies to the Minister in writing for a revocation of its registration,
- (b) ceases to comply with the requirements of this Act for its registration as such,

(c) fails to file an information return as and when required under this Act or a regulation, [or]

(e) fails to comply with or contravenes ... section ... 230 [containing the requirement to maintain records and books of account].

Revocation of registered status is also authorized where the charity engages in prohibited commercial activities,<sup>lxxxix</sup> fails to satisfy its disbursement quota,<sup>lxxxii</sup> makes a gift of property to another charity in order to “unduly delay the expenditure of amounts on charitable activities”,<sup>lxxxiii</sup> accepts a gift from another charity in order to enable the other charity to delay spending funds on charitable activities,<sup>lxxxiv</sup> makes a false statement in order to obtain charitable status,<sup>lxxxv</sup> issues a receipt for a gift or a donation otherwise than in accordance with the ITA and the regulations or that contains false information,<sup>lxxxvi</sup> or fails to comply with or contravenes enforcement measures in sections 231.1 to 231.5 of the ITA.<sup>lxxxvii</sup> Although the ITA does not specify the manner in which the decision to revoke charitable status must be arrived at, judicial decisions have held that this process must be governed by principles of natural justice and procedural fairness such that “the Minister, before sending the notice, must first give to the person or persons concerned a reasonable opportunity to answer the allegations made against them.”<sup>lxxxviii</sup> In addition, courts have emphasized that the decision to send a notice of revocation “must be arrived at in a manner enabling the Minister to create a record ... reflecting not only his point of view but also that of the organization concerned.”<sup>lxxxix</sup>

Where the CRA issues a notice of revocation, the charity has 90 days to file a notice of objection,<sup>xc</sup> whereupon the Appeals Branch may reject or confirm the revocation.<sup>xcii</sup> If the Appeals Branch upholds the decision to revoke charitable status, the charity is given 30 days to file a notice of appeal to the Federal Court of Appeal,<sup>xcii</sup> which is required to hear and determine the appeal in a summary way.<sup>xciii</sup> For this purpose,

judicial decisions have held that the charity bears the burden of disproving the assumptions of fact on which the decision to revoke charitable status is based.<sup>xciv</sup> Where the charity does not challenge the notice of revocation or the decision of the Appeals Branch or the Federal Court of Appeal upholds the decision to revoke charitable status, revocation becomes effective when a copy of the notice is published in the *Canada Gazette*.<sup>xcv</sup> Where charitable status is revoked, section 188 gives the charity one year to expend its resources on charitable activities or transfer its property to an arm's length charity, after which the value of any remaining assets is effectively forfeited to the Crown under a special penalty tax for this purpose.<sup>xcvi</sup>

In recent years, the number of registered charities whose registration has been revoked has decreased from approximately 2,400 in 2002 to approximately 1,800 in 2007-08. As Table 3 demonstrates, most of these revocations are at the request of the charity or for failing to file an annual information return within 6 months of the end of its taxation year, with only a very few number of revocations for failing to comply with other requirements for registered status. Since the number of revocations for failing to file

**Table 3: Revocations of Charitable Status, 2002-2008<sup>xcvii</sup>**

Year	Revocations by Request	Revocations for Failure to File Information Return	Revocations for Cause	Total Revocations
2002	800	1,599	5	2,404
2003	788	1,127	6	1,921
2004	709	1,261	8	1,978
2005	438	963	11	1,412
2007-08	958	771	49	1,778

an information return on time exceeded 2,700 in 1999-2000,<sup>xcviii</sup> it is apparent that revocations for this reason have decreased significantly in recent years.<sup>xcix</sup> In contrast, the number of revocations for cause appears to have increased significantly in recent years, compared not only to figures from the early 2000s but also the early 1990s, when 33 charities had their status revoked on this basis from 1991 to 1996.<sup>c</sup> As the CRA does not provide information on the grounds for revocations for cause, it is impossible to know whether concerns about terrorism have played a role in these revocations.<sup>ci</sup> For this reason, the Air India Inquiry recommended that the CRA provide this information where practicable.<sup>cii</sup>

As revocation is a severe sanction for relatively minor breaches such as the failure to file an information return on time, particularly if it leads to the imposition of the penalty tax under section 188, several studies in the late 1990s and early 2000s recommended that the federal government should enact intermediate sanctions and penalties as part of a more flexible approach to encourage regulatory compliance in the charitable sector.<sup>ciii</sup> In response to these recommendations, the federal government announced in the 2004 Federal Budget that it would amend the ITA to introduce “new, more effective sanctions that are more appropriate than revocation for relatively minor breaches of the *Income Tax Act*.”<sup>civ</sup> Applicable to taxation years beginning after March 23, 2005, these intermediate penalties and sanctions allow the CRA to impose various penalty taxes and to suspend a charity’s privilege to issue charitable receipts where the charity fails to comply with specific statutory requirements.

Under new subsections 188.1(1) and (2), a registered charity that carries on an unrelated business (or any business in the case of a private foundation) is liable to a

penalty tax equal to 5% of its gross revenue from the business or all of its gross revenue from the business if it was assessed for this penalty tax within the previous 5 years. Subsection 188.1(3) imposes a similar penalty tax on charitable foundations that acquire control of any corporation, equal to 5% of the amount of all dividends received from the corporation or the full amount of these dividends if it was assessed for this penalty tax within the previous 5 years. Subsection 188.1(6) imposes a penalty of \$500 on charities that fail to file an annual information return within 6 months of the end of its taxation year. Other penalty taxes apply where a registered charity confers an “undue benefit” on selected persons,<sup>cv</sup> issues a receipt for a gift otherwise than in accordance with the ITA,<sup>cvi</sup> makes a false statement on a receipt,<sup>cvi</sup> or makes a gift of property to another charity in order to “unduly delay the expenditure of amounts on charitable activities”.<sup>cvi</sup>

In addition to these penalties, new section 188.2 authorizes the Minister to suspend the charity’s tax-receipting privileges for one year where it has been penalized for a second time within five years for carrying on an unrelated business (or any business in the case of a private foundation) or conferring an undue benefit on a person,<sup>cix</sup> where it incurs penalties exceeding \$25,000 for making false statements on receipts,<sup>cx</sup> where it fails to maintain adequate records and books of account or fails to comply with other enforcement measures,<sup>cx</sup> or if it may reasonably be considered that the charity has acted in concert with another charity whose receipting privileges have been suspended to accept a gift or transfer of property on behalf of that other charity.<sup>cxii</sup> During the one-year suspension period, moreover, the charity is not only precluded from issuing receipts for charitable gifts, but is also required, before accepting any gift, to inform the donor that its tax-receipting privileges have been suspended, that no deduction or credit may be

claimed in respect of the gift, and that the gift is not a gift to a qualified donee.<sup>cxiii</sup> To the extent that existing and potential supporters are given notice of the charity's failings through this sanction, they may be in a position to persuade the charity to take remedial measures including the removal and replacement of directors or trustees, which the federal government could not accomplish directly given the constitutional limits of its jurisdictional authority.

Unlike the denial or revocation of charitable status, which can be appealed only to the Federal Court of Appeal, the imposition of these intermediate penalties and sanctions may be appealed to the Tax Court of Canada.<sup>cxiv</sup> Where the Appeals Branch of the CRA confirms the assessment or suspension of receipting privileges, the charity has 90 days to file a notice of appeal to the Tax Court of Canada.<sup>cxv</sup> A charity may also apply to the Tax Court of Canada for a postponement of the period for suspending receipting privileges,<sup>cxvi</sup> which may grant such an application if "it would be just and equitable to do so."<sup>cxvii</sup>

In contrast to the statistics that it provides on applications, registrations and revocations, the CRA does not appear to provide statistics on the use of intermediate penalties and sanctions and the grounds for their application.<sup>cxviii</sup> However, a significant decrease in the number of revocations in 2005 is likely attributable, in part at least, to the availability of these new penalties and sanctions.

## **5. The Charities Registration (Security Information) Act**

In addition to the provisions of the ITA, the legal framework for registered charities also includes the CRSIA. First proposed as Bill C-16 on March 15, 2001,<sup>cxix</sup> the CRSIA was designed to demonstrate Canada's commitment to the prevention of terrorist

financing in accordance with resolutions adopted by the G-7 and the United Nations in 1996,<sup>cxx</sup> and Canada's agreement to the *International Convention for the Suppression of the Financing of Terrorism* in February 2000,<sup>cxxi</sup> and introduced in direct response to a specific recommendation by the Special Senate Committee on Security and Intelligence in January 1999 that:

... consideration be given to amending the *Income Tax Act* to allow Revenue Canada [now the Canada Customs and Revenue Agency] to deny charitable registration to any group on the basis of a certificate from the Canadian Security Intelligence Service that the group constitutes a threat to the security of Canada.<sup>cxxii</sup>

After the terrorist attacks of September 11, 2001, Bill C-16 was incorporated into the federal government's anti-terrorism legislation as Part 6 of Bill C-36,<sup>cxxiii</sup> which was enacted in the autumn of 2001 and came into force on December 24, 2001.

According to subsection 2(1) of the CRSIA, the purpose of the legislation is threefold:

... to demonstrate Canada's commitment to participating in concerted international efforts to deny support to those who engage in terrorism, to protect the integrity of the registration system for charities under the *Income Tax Act* and to maintain the confidence of Canadian taxpayers that the benefits of charitable registration are made available only to organizations that operate exclusively for charitable purposes.<sup>cxxiv</sup>

In addition to demonstrating Canada's commitment to international efforts to prevent terrorist financing, therefore, the CRSIA also aims to protect the integrity of the registration system for charities under the ITA, and to maintain the confidence of Canadian taxpayer that the benefits of charitable status are available only to organizations operating exclusively for charitable purposes.

Substantively, the key provisions of the CRSIA are subsections 4(1) and 8(1) and section 13. According to the first of these provisions, the Minister of Public Safety and Emergency Preparedness and Minister of National Revenue may sign a certificate

expressing their opinion, based on security or criminal intelligence information, that there are reasonable grounds to believe:

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

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

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

According to subsection 8(1), a certificate that is determined to be reasonable under the process outlined below is “conclusive proof that, in the case of an applicant, it is ineligible to become a registered charity or, in the case of a registered charity, that it does not comply with the requirements to continue to be a registered charity.” According to section 13 of the CRSIA, a certificate is “effective for a period of seven years beginning on the first day it is determined to be reasonable” unless it is cancelled earlier. On this basis, therefore, the CRA may deny registered status to an applicant or revoke the charitable status of a registered charity where the applicant or registered charity is subject to a certificate that is determined to be reasonable under the CRSIA.

The process for determining whether a certificate issued under subsection 4(1) is reasonable is set out in sections 5 to 7 of the CRSIA. According to subsection 5(1), as soon as the Minister of Public Safety and Emergency Preparedness and the Minister of National Revenue have signed a certificate, the Minister of Public Safety and Emergency Preparedness or a person authorized by this Minister shall cause the applicant or registered charity to be served with a copy of the certificate and a notice informing it that



“the certificate will be referred to the Federal Court not earlier than seven days after service and that, if the certificate is determined to be reasonable, the applicant will be ineligible to become a registered charity or the registration of the registered charity will be revoked, as the case may be.” In addition, subsection 5(5) stipulates that seven days after this service “or as soon afterwards as is practicable,” the Minister of Public Safety and Emergency Preparedness or a person authorized by this Minister shall file a copy of the certificate with the Federal Court for it to make a determination under section 7 and cause the applicant or registered charity to be served with a notice informing it of the filing of the certificate. In order to preserve the confidentiality of this process, subsection 5(3) permits the applicant or registered charity to apply to the Federal Court for an order directing that “the identity of the applicant or registered charity not be published or broadcast in any way” except in accordance with the CRSIA, or that “any documents to be filed with the Federal Court in connection with the reference be treated as confidential.”<sup>cxxv</sup>

According to section 7 of the CRSIA, the Chief Justice of the Federal Court or a judge of the Court designated by the Chief Justice shall “determine whether the certificate is reasonable on the basis of the information and evidence available,”<sup>cxxvi</sup> and “quash a certificate if the judge is of the opinion that it is not reasonable.”<sup>cxxvii</sup> For the purpose of this determination, section 6 provides for an informal hearing process,<sup>cxxviii</sup> in which the judge is required to examine the information and evidence on which the certificate is based in private,<sup>cxxix</sup> provide the applicant or registered charity with a summary of the information or evidence that “enables it to be reasonably informed of the circumstances giving rise to the certificate,”<sup>cxxx</sup> and provide the applicant or registered

charity with an opportunity to be heard.<sup>cxxxix</sup> Section 6 also provides for the confidentiality of information and evidence if the judge concludes that its disclosure would be “injurious to national security or endanger the safety of any person” if disclosed,<sup>cxxxix</sup> and waives the ordinary rules of evidence by allowing the judge to “receive into evidence anything that, in the opinion of the judge is reliable and appropriate, even if it is inadmissible in a court of law” and to “base the decision on that evidence.”<sup>cxxxix</sup>

Where a judge determines that a certificate is reasonable under subsection 7(1) of the CRSIA, subsection 8(2) stipulates that the determination is “final and ... not subject to appeal or judicial review.” For this purpose, subsections 168(3) and 172(3.1) of the ITA exclude these determinations from the normal appeals processes that are otherwise available when charitable status is denied or revoked – both to the Appeals Branch and to the Federal Court of Appeal. Where a certificate is determined to be reasonable under subsection 7(1), the Minister of Public Safety and Emergency Preparedness is required “without delay” to cause the certificate to be published in the *Canada Gazette*,<sup>cxxxix</sup> thereby making the name of the applicant or registered charity public information.

Notwithstanding a determination that a certificate is reasonable, section 10 of the CRSIA provides for a review of the certificate by the Minister of Public Safety and Emergency Preparedness and the Minister of National Revenue if the applicant or former registered charity believes that there has been a “material change in circumstances” since the determination under subsection 7(1). For this purpose, the Ministers may consider “any submission made by the applicant or former registered charity” and “any information that is made available” to them,<sup>cxxxix</sup> and decide whether has or has not been a material change in circumstances.<sup>cxxxix</sup> If the Ministers decide that there has not been a

material change in circumstances, the CRSIA requires them to deny the application<sup>cxxxvii</sup>; if the Ministers decide that there has been a material change of circumstances, on the other hand, the CRSIA requires them to determine whether there are reasonable grounds as provided in subsection 4(1) and accordingly to continue the certificate in effect or cancel the certificate as of the date of the decision.<sup>cxxxviii</sup> If the Ministers do not make a decision within 120 days after receiving the application, the CRSIA provides that the certificate is cancelled at the end of that 120-day period.<sup>cxxxix</sup> Where a certificate is cancelled for either of these reasons, the Minister of Public Safety and Emergency Preparedness is required to cause to be published in the *Canada Gazette* notice of the cancellation “in a manner that mentions the original publication of the certificate”.<sup>cxl</sup>

If the Ministers decide that there has been no material change in circumstance or that there has been such a change but that a reasonable ground in subsection 4(1) still applies, the applicant or registered charity may apply for a review by the Federal Court in accordance with the procedure set out in section 6 of the CRSIA.<sup>cxli</sup> In this circumstance, subsection 11(3) stipulates that the Court shall refer the application to the Minister if it determines that a material change of circumstance has occurred, and subsection 11(4) states that the certificate is cancelled if the Court determines that there are not reasonable grounds under subsection 4(1). As with a determination under subsection 7(1) a determination under section 11 is not subject to appeal or judicial review.<sup>cxlii</sup> If the certificate is cancelled by reason of a determination by the Federal Court, notice of the cancellation must be published in the *Canada Gazette*.<sup>cxliii</sup>

To date, no certificates have been issued under the CRSIA.<sup>cxliv</sup> Indeed, according to then Commissioner of the Canada Customs and Revenue Agency (CCRA), Michel Dorais:

... if there was an organization that had some link with terrorist organizations, it would probably be faulting on other grounds, so before we'd get to that point the process of decertification would already be launched on the grounds of money not flowing for charity purposes or books not being kept properly.<sup>cxlv</sup>

As well, since the onus of proof under an ordinary revocation proceeding falls on the charity to disprove the assumptions of fact on which the decision to revoke is based, it may be easier to revoke registered status on this basis than under the CRSIA, notwithstanding the “reasonable belief” standard on which revocation under the CRSIA may be based.

Despite the fact that no certificates have been issued under the CRSIA, however, the CRA maintains that CRSIA provides “an effective deterrent” and a “prudent reserve power to address cases of terrorism” when “classified information may be needed to establish an organization’s support for terrorism.”<sup>cxlvi</sup> For charitable organizations and their advocates, on the other hand, the CRSIA has created “a chill on charitable activities in Canada, as charities hesitate to undertake programs that might expose them to violation of anti-terrorism legislation and the possible loss of their charitable status.”<sup>cxlvii</sup>

### **III. Information Collection and Sharing**

In order to ensure that charities satisfy and adhere to the legal and administrative requirements for registered status under the ITA, applicants for charitable status must file an application identifying the name and address of the organization, its directors or trustees, its organizational structure, its programs and activities, and financial

information,<sup>cxlviii</sup> and registered charities must file an annual information return containing the names of the charity's directors or trustees, a description of the charity's programs and activities, and financial information reporting the charity's assets, revenue and expenditures, including gifts to other qualified donees.<sup>cxlix</sup> The ITA also grants the CRA broad investigatory powers, allowing authorized persons to

(a) inspect, audit or examine the books and records of a taxpayer and any document or the taxpayer or of any other person that related or may relate to the information that is or should be in the books or records of the taxpayer ..., and

(b) examine ... any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in ... ascertaining the information that is or should be in the books or records of the taxpayer ...,

and for these purposes to

(c) ... enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act, and for that purpose, require the owner or manager to attend at the premises or place with the authorized person.<sup>cl</sup>

Although the CRA generally does not need to obtain search warrants to exercise these extensive audit powers,<sup>cli</sup> courts have held that they must be obtained if the predominate purpose of the investigation is to determine whether criminal liability exists.<sup>clii</sup> In these circumstances, the CRA must obtain a search warrant based on the traditional criminal law standard that there are reasonable grounds to believe that an offence has been committed and that the search will reveal evidence of this offence.

In addition to these investigatory powers, the CRA may, for any purpose related to the administration or enforcement of the ITA, a tax treaty, or a tax information exchange agreement, serve notice on any person, requiring the person to provide "any information or additional information" or "any document."<sup>cliii</sup> Where it obtains a warrant from a

superior court judge, the CRA may also “enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act” and “seize the document or thing”.<sup>cliv</sup>

In recent years, the CRA has significantly increased the number of registered charities that it audits every year. As Table 4 indicates, annual audits fell between 2002 and 2003 but have risen steadily since then, from 356 in 2003 to 790 in 2007-08.

**Table 4: Audits of Registered Charities, 2002-2008<sup>clv</sup>**

Year	Audits
2002	475
2003	356
2004	367
2005	596
2007-08	790

Despite this increase, the number of charities that are subject to annual audit represents less than 1 percent of approximately 83,000 registered charities. Indeed, although the audit rate is significantly higher than it was in the early 2000s, it is only slightly higher than it was in 1995, when there were roughly 70,000 registered charities<sup>clvi</sup> and the CRA conducted 576 audits.<sup>clvii</sup>

In addition to the information that it receives from annual information returns and investigations, the CRA also reviews intelligence assessments, briefs and classified information provided by the RCMP and CSIS, as well as publicly available information, to determine whether charities are involved with or lend support to terrorist organizations.<sup>clviii</sup> Recent amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* also authorize FINTRAC to disclose information to the CRA where there are reasonable grounds to suspect that the information is relevant to investigating or prosecuting a money laundering offence or a terrorist financing offence and reasonable grounds to suspect that the information is relevant to determining whether an applicant is eligible for charitable status under the ITA or a registered charity has ceased to comply with the requirements for this status.<sup>clix</sup> Although the CRA does not obtain information from revenue authorities and charities regulators in other countries, it hopes to be able to conclude such arrangements in the future.<sup>clx</sup>

As a general rule, the ITA provides for the confidentiality of taxpayer information, stipulating in subsection 241(1) that, except as expressly authorized, no official shall:

(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;

(b) knowingly allow any person to have access to any taxpayer information; or

(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act ...

and in subsection 241(2) that “no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.” For the purposes of these rules, the ITA defines an “official” generally as any person employed by or engaged by or on behalf of Her Majesty in right of Canada or a province, and “taxpayer information” as “information of any kind and in any form relating to one or more taxpayers” that is either obtained by or on behalf of the CRA for the purposes of the ITA or prepared from this information, excluding “information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.”<sup>clxi</sup>

Notwithstanding these general rules regarding the confidentiality of taxpayer information, other provisions allow for the disclosure of taxpayer information in criminal proceedings under any Act of Parliament or in legal proceedings related to the enforcement of the ITA,<sup>clxii</sup> where a warrant to investigate a threat to the security of Canada is issued under subsection 21(3) of the *Canadian Security Intelligence Service Act*,<sup>clxiii</sup> or where a judge issues an order regarding an investigation into a terrorism offence under subsection 462.48(3) of the *Criminal Code*.<sup>clxiv</sup> As well, another provision authorizes the Minister to “provide to appropriate persons any taxpayer information relating to imminent danger of death or physical injury to any individual.”<sup>clxv</sup> In practice,



however, the CRA considers the threshold for disclosing information under this “imminent danger” provision very high, and such disclosures are reportedly “rare and limited.”<sup>clxvi</sup>

In addition to these provisions, the ITA contains three further exceptions to the general confidentiality rules that apply specifically to registered charities and applicants for charitable status. First, under subsection 241(3.2) of the ITA, an official may provide to “any person” various kinds of information relating to a person that was “at any time” a registered charity, including: (a) a copy of the charity’s governing documents, including its statement of purpose; (b) any information contained in its application for charitable status; (c) the names of persons who at any time were its directors and the periods during which they were directors; (d) a copy of the notification of the charity’s registration, including any conditions and warnings; (e) a copy of any notice of revocation or annulment sent to the charity if its registration has been revoked or annulled; (f) financial statements required to be included in the annual information return; (g) a copy of any notice imposing a penalty tax under section 188.1 of the ITA or suspending the charity’s privilege to issue receipts under section 188.2; and (h) information filed by the charity in support of an application for special status or exemption under the ITA.<sup>clxvii</sup> Announced in the 1997 Federal Budget and enacted in 1998, this provision was introduced in order to “improve donors’ access to information about charities, and provide for greater transparency with regard to charity’s affairs” in order to “increase self-discipline in the charitable sector, and empower donors to play a better role in monitoring the sector” and to enable the revenue authorities to “better address concerns that have been raised regarding those few charities that are not meeting the requirements for charitable

status.”<sup>clxviii</sup> While the disclosure rule applies to charities that are currently registered or were registered “at any time”, however, it does not apply to charities that have merely applied for registered status.

Second, under paragraph 241(4)(f.1) of the ITA, an official may provide any taxpayer information to another official for the purposes of the administration and enforcement of the CRSIA. Enacted as part of the federal government’s anti-terrorism legislation in autumn 2001,<sup>clxix</sup> this provision effectively allows the CRA to share any taxpayer information for the purpose of assessing whether there are reasonable grounds to believe that a registered charity or applicant for registered status has made, makes or will make its resources available to a terrorist organization. Where the official to whom this taxpayer information is disclosed is a member of CSIS or the RCMP, moreover, new subsection 241(9.1) allows this official to use or communicate to another official of CSIS or the RCMP any of this information other than “designated donor information” for the purpose of:

- (a) investigating whether an offence may have been committed, ascertaining the identity of a person or persons who may have committed an offence, or prosecuting an offence, which offence is
  - (i) described in Part II.1 of the *Criminal Code* [terrorism offences], or
  - (ii) described in section 462.31 of the *Criminal Code* [laundering proceeds of crime], if that investigation, ascertainment or prosecution is related to an investigation, ascertainment or prosecution in respect of an offence described in Part II.1 of that Act, or
- (b) investigating whether the activities of any person may constitute threats to the security of Canada, as defined in section 2 of the *Canadian Security Intelligence Service Act*.<sup>clxx</sup>

For the purpose of these provisions, the ITA protects the confidentiality of Canadian donors by defining “designated donor information” as information regarding a gift to a charity or applicant for charitable status that “directly or indirectly reveals the identity of the donor” (other than a donor who is not resident in Canada and is neither a citizen of

Canada nor subject to Canadian income tax under Part I of the ITA).<sup>clxxi</sup> Subsection 241(9.1) and the definition of “designated donor information” were recently enacted as part of a series of amendments to federal legislation dealing with terrorist financing.<sup>clxxii</sup>

Finally, new subsection 241(9), which was enacted in 2006 together with other amendments to federal legislation dealing with terrorist financing,<sup>clxxiii</sup> allows an official to provide to an official of CSIS, the RCMP or FINTRAC three kinds of information. Paragraph (a) provides for the disclosure of “publicly accessible charity information” which the ITA defines as the information of a charity or applicant for charitable status that is listed in subsection 241(3.2), information other than designated donor information that is contained in a charity’s annual information return, and information that is prepared from this information.<sup>clxxiv</sup> More significantly, paragraph (b) allows for the disclosure of “designated taxpayer information” if there are reasonable grounds to suspect that the information would be relevant to:

- (i) an investigation by the Canadian Security Intelligence Service of whether the activity of any person may constitute threats to the security of Canada, as defined in section 2 of the *Canadian Security Intelligence Service Act*,
- (ii) an investigation of whether an offence may have been committed under
  - (A) Part II.1 of the *Criminal Code* [terrorism offences], or
  - (B) section 462.31 of the *Criminal Code* [laundering proceeds of crime], if that investigation is related to an offence under Part II.1 of that Act, or
- (iii) the prosecution of an offence referred to in subparagraph (ii).

For the purpose of this provision, the ITA defines “designated taxpayer information” as taxpayer information (other than designated donor information) of a registered charity or an applicant for charitable status that is:

- (a) in respect of a financial transaction

- (i) relating to the importation or exportation of currency or monetary instruments by the charity or applicant, or
- (ii) in which the charity or applicant has engaged a person to whom section 5 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* applies [listing persons who are required to keep records and report suspicious transactions],
- (b) information provided to the Minister by the Canadian Security Intelligence Service, the Royal Canadian Mounted Police or the Financial Transactions and Reports Analysis Centre of Canada,
- (c) the name, address, date of birth and citizenship of any current or former director, trustee or like official, or of any agent, mandatary or employee, of the charity or applicant,
- (d) information submitted by the charity or applicant in support of an application for registration as a registered charity that is not publicly accessible charity information,
- (e) publicly available, including commercially available databases, or
- (f) information prepared from publicly accessible charity information and information referred to in paragraphs (a) to (e).<sup>clxxv</sup>

As well, paragraph (c) provides for the disclosure of information setting out the reasonable grounds for suspicion under paragraph (b) to the extent that those grounds rely on publicly accessible charity information or designated taxpayer information. Like subsection 241(9.1), therefore, subsection 249(9) protects the confidentiality of Canadian donors by excluding designated donor information from the kinds of information that may be disclosed. Unlike subsection 241(9.1), on the other hand, which depends on an initial disclosure of taxpayer information for the purposes of the administration and enforcement of the CRSIA, subsection 241(9) permits the routine disclosure of publicly accessible charity information and the disclosure of designated taxpayer information whenever there are reasonable grounds to suspect that the information may be relevant to the investigation of a threat to the security of Canada or an investigation or prosecution of any of the terrorism offences in the *Criminal Code*.

#### IV. Evaluation

In order to evaluate Canada’s legal framework for limiting the use or misuse of charitable organizations for terrorist financing, it is useful to begin by recognizing two important considerations on which this evaluation should be based. First, as Canadian experience with the Babbar Khalsa Society and Sikh temple funds sadly demonstrates, charitable organizations can be vulnerable to manipulation by individuals and groups who seek to take advantage of the legitimacy and fiscal benefits that these organizations obtain through registered status in order to finance terrorist activities.<sup>clxxvi</sup> For this reason, effective supervision and regulation of registered charities is essential – not only to constrain opportunities for terrorist financing, but also to protect the integrity of the legal regime governing the conferral of tax benefits under the ITA, and to safeguard the interests of donors who expect that their charitable contributions will be used for legitimate purposes.<sup>clxxvii</sup> For this reason, as well, it is commendable that Canada has joined international efforts to prevent terrorist financing through charitable organizations – for example, by signing the *International Convention for the Suppression of the Financing of Terrorism* in February 2000,<sup>clxxviii</sup> and participating in the Financial Action Task Force on Money Laundering (FATF), an inter-governmental body that was established in order to develop and promote national and international policies to combat money laundering and terrorist financing.<sup>clxxix</sup> For all of these reasons, moreover, this paper fully endorses the declared purposes of the CRSIA to “demonstrate Canada’s commitment to participating in concerted international efforts to deny support to those who engage in terrorism,” to “protect the integrity of the registration system for charities under the *Income Tax Act*” and to “maintain the confidence of Canadian taxpayers that

the benefits of charitable registration are made available only to organizations that operate exclusively for charitable purposes.”<sup>clxxx</sup>

Second, it is also important to recognize the central role that the charities play nationally and internationally -- as key participants in domestic economies and the global economy,<sup>clxxxii</sup> as organizations that foster international solidarity and provide humanitarian and development assistance to people in some of the most troubled and disadvantaged parts of the world,<sup>clxxxiii</sup> as institutions that promote social inclusion and build social capital,<sup>clxxxiii</sup> and as vehicles through which citizens experience each of the four fundamental freedoms guaranteed by the Canadian *Charter of Rights and Freedoms*<sup>clxxxiv</sup> -- as well as the practical challenges that many charities face as small organizations with unpaid volunteers,<sup>clxxxv</sup> and the very small number of charities in Canada and other countries that have actually had any connection with terrorist activities.<sup>clxxxvi</sup> For these reasons, as advocates for the charitable sector have emphasized, charities should generally be seen as valuable allies in the global struggle against terrorism, rather than suspects.<sup>clxxxvii</sup> More importantly, for the purposes of this article, government supervision and regulation of the charitable sector should be proportionate and risk-based – emphasizing capacity-building and best practices to prevent the use or misuse of charitable organizations for terrorist financing, ensuring transparency and self-regulation to the greatest extent possible, scrutinizing transactions and organizations that pose the greatest risks for terrorist links, and limiting more serious regulatory sanctions to the rare instances where charities provide support to terrorist organizations.<sup>clxxxviii</sup>

Turning to the specific legal regime for registered charities in Canada, recent initiatives demonstrate increased emphasis on the proportionate and risk-based regulatory

approach described in the previous paragraph. Through its Charities Partnership and Outreach Program, for example, the CRA funds education and training aimed at improving the capacity of registered charities to comply with statutory and administrative requirements for registration under the ITA.<sup>clxxxix</sup> The CRA has also issued guidelines for charities operating outside Canada,<sup>cx</sup> though it has yet to issue its own guidelines on best practices to prevent the use and abuse of terrorist organizations for terrorist financing.<sup>cxci</sup> Amendments to the ITA that authorize the public disclosure of information about registered charities have greatly increased transparency within the charitable sector, enabling donors and members to play a much greater role monitoring the sector and initiating regulatory responses.<sup>cxcii</sup> As well, recent increases in audit rates make it more likely that organizations with potential links to terrorists will be identified, though audit rates remain very small and appear to be lower than they were in the mid-1990s.<sup>cxciiii</sup> Since many audits are initiated by public complaints, however, increased transparency and public disclosure likely permit more targeted audits. Amendments authorizing information exchanges with CSIS, the RCMP and FINTRAC also enable these organizations and the CRA to devote greater attention to organizations and individuals where risks of terrorist links appear to be greatest.<sup>cxciiv</sup> Finally, the introduction of intermediate penalties and sanctions in 2005 provides for a range of regulatory responses that are more proportionate to different categories of non-compliance than the ultimate sanction of revocation.<sup>cxci</sup> They also provide signals to existing and potential donors that a charity may not be complying with relevant laws, enabling these individuals to put additional pressure on the charity to take remedial measures.

These measures go a long way toward preventing the use and misuse of charitable organizations for terrorist financing that occurred in Canada with the Babbar Khalsa Society and Sikh temple funds. In the case of the Babbar Khalsa Society, current provisions for the exchange of information might well have caused the CRA to deny registered status before it was granted, on the grounds that the organization's purposes or activities were not exclusively charitable according to the legal definition adopted in the *Pemsel* case.<sup>cxvii</sup> Alternatively, the public disclosure of information on registered charities under subsection 241(3.2) of the ITA might have created pressure for revocation much earlier than 1996. Since this rule limits the disclosure of information to charities that are or were registered, however, it does not enable members of the public to monitor the organizations that apply for charitable status, as a consequence of which public pressure can only be brought to bear once the charity has obtained registered status. For this reason, subsection 241(3.2) might reasonably be amended to authorize the disclosure of information relating to a person who was at any time either a registered charity or an applicant for registered status.

In the case of Sikh temple funds, increased transparency and information exchange could have produced a measured regulatory response, beginning with a formal audit and the imposition of intermediate penalties and sanctions designed to encourage self-regulation by members of the affected temples, culminating if necessary in the ultimate sanction of revocation and the application of the penalty tax under section 188 of the ITA. Since the federal government's constitutional jurisdiction over charities extends only to the conferral of fiscal benefits under the ITA, however, other regulatory responses such as the removal and replacement of directors or trustees would have



required action by the provincial Attorney-General.<sup>cxcvii</sup> Although publicity might have prompted such a response, provincial governments have been reluctant to exercise their jurisdictional authority in this area. For this reason, federal and provincial governments should consider alternative arrangements to facilitate a more robust regulatory regime for charities, involving at the very least the exchange of information about charities and more ambitiously the possible delegation of federal and provincial authority over charities to an administrative agency that could exercise broad supervisory and regulatory powers. Since federal regulation applies only to charities that seek or obtain registered status, moreover, not charities that do not apply for registered status, nor other nonprofit and voluntary organizations, federal and provincial governments should also consider what joint initiatives might be taken to establish a more extensive regulatory regime for charities and other nonprofit and voluntary organizations, irrespective of their registered status under the ITA.

As part of the legal and administrative framework for registered charities in Canada, the CRSIA has a very limited role to play. Since support for terrorist activities cannot be construed as charitable under any of the categories contained in the legal definition, denial or revocation of registered status can generally be accomplished under the ordinary rules of the ITA, without having to resort to the CRSIA. As the then Commissioner of the CCRA explained to the Subcommittee on Public Safety and National Security of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness in May 2005:

... if there was an organization that had some link with terrorist organizations, it would probably be faulting on other grounds, so before we'd get to that point the process of decertification would already be launched on the grounds of money not flowing for charity purposes or books not being kept properly.<sup>cxcviii</sup>

The effect of the CRSIA, therefore, is not to permit the denial or revocation of registered status for charities that support terrorist activities, but to establish a different process for the determination of charitable status where security considerations suggest that the information on which this determination is based should remain confidential.

While confidentiality is undoubtedly a legitimate concern in this and other legal responses to terrorism, the CRSIA has four significant deficiencies. First, the grounds on which registered status may be denied or revoked are extremely broad, applying where the applicant or registered charity “has made, makes or will make available any resources directly or indirectly” to a listed terrorist entity, “made available any resources directly or indirectly” to an entity that was at the time or continues to be engaged in terrorist activities, or “makes or will make available any resources directly or indirectly” to an entity that engages or will engage in terrorist activities.<sup>cxix</sup> Second, the CRSIA requires no knowledge or fault on the part of the applicant or registered charity, and does not even allow for a due diligence defence for charities that adopt reasonable measures to ensure that resources are not made available to terrorists. Third, the extent of confidentiality under the CRSIA may be such that the charity is unable to mount a serious adversarial challenge to the information on which a certificate is based.<sup>cc</sup> Finally, in contrast to the intermediate penalties and sanctions that were added to the ITA in 2005,<sup>cci</sup> the only sanction under the CRSIA is the denial or revocation of charitable status.<sup>ccii</sup> The serious consequences that would accompany deregistration under the CRSIA, which, as Terrance Carter et al. note, could include “the bankruptcy, insolvency, or winding up of the charity and, in turn, expose the charity's directors to civil liability at common law for breach of

their fiduciary duties by not adequately protecting the assets of the charity,” only make the act's procedural framework more troubling.<sup>cciii</sup>

Because the grounds for denying or revoking registered status are so broad, the CRSIA is likely to be applied either selectively or not at all. More seriously, the combination of this broad language with the absence of any knowledge or fault requirement or a due diligence defence, is apt to deter charities from engaging in international operations, particularly in conflict zones, where it is often difficult to monitor the use of charitable resources by agents and contractors. This is particularly so to the extent that the CRSIA results in revocation of charitable status and the potential application of the penalty tax under section 188 of the ITA.<sup>cciv</sup> For these reasons, the CRSIA might reasonably be amended to include a knowledge or fault requirement in subsection 4(1), stipulating that the applicant or registered charity either “knowingly or negligently” makes, made, or will make available resources to a listed terrorist entity or an entity that it “knew or ought to have known” engages in a terrorist activity.<sup>ccv</sup> In addition to this knowledge or fault requirement, the CRSIA might also be amended by introducing a due diligence defence, according to which a certificate shall be quashed where the applicant or registered charity demonstrates that it has exercised due diligence to ensure that its resources are not available to terrorists.<sup>ccvi</sup> For this purpose, moreover, the CRA might develop best practice guidelines that charities could rely upon in order to demonstrate due diligence.<sup>ccvii</sup> Finally, where a charity’s resources are made available to terrorists despite its best efforts, the CRSIA might also be amended to allow for intermediate penalties and sanctions like those in sections 188.1 and 188.2 of the ITA. As

well, an alternative procedure might be devised to give charities a more meaningful opportunity to challenge the information on which a certificate is based.

## V. Conclusion

Over the past decade, a number of changes have significantly improved the effectiveness of Canada's legal framework to constrain the use or misuse of charitable organizations for terrorist financing. Amendments to the ITA authorizing the public disclosure of information about registered charities greatly increase the probability that regulatory non-compliance will be discovered and addressed either through self-regulation by members and donors or through regulatory responses by federal or provincial authorities. Information sharing between the CRA and other government agencies such as CSIS, the RCMP and FINTRAC also increases the likelihood that organizations that make resources available to terrorists will be identified so that regulatory responses may be initiated. At the same time, the recent introduction of intermediate penalties and sanctions allows for a more measured regulatory response based on the degree of non-compliance. Finally, the CRSIA allows for the use of confidential information to deny registered status where a charity makes resources available to terrorists. Were these measures in place in the late 1980s and early 1990s, it is difficult to imagine that the Babbar Khalsa Society would have been able to obtain charitable status or retain this status until 1996, and difficult to imagine that Sikh temple funds would have been misused for terrorist financing.

Notwithstanding these improvements in Canada's legal framework, there are four areas in which further improvements might be made. First, in order to prevent

organizations with links to terrorism from obtaining charitable status in the first place, subsection 241(3.2) of the ITA might be amended to authorize the disclosure of information about applicants for charitable status as well as persons who are or were registered. Second, administrative information sharing arrangements might be expanded to include exchanges with revenue authorities and other government agencies in other countries. Third, in order to ensure a proportionate response to the risk of terrorist financing through charitable organizations, the CRSIA should be amended to introduce a knowledge or negligence requirement, a due diligence defence, and intermediate penalties. Finally, federal and provincial governments should cooperate to establish a more robust regulatory regime for charities and other nonprofit and voluntary organizations, including a greater range of regulatory responses than tax-based penalties and sanctions, and extending to organizations that might be used or misused for terrorist financing but do not apply for charitable status.

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<sup>i</sup> See the question addressed to the Minister of National Revenue by Val Meredith, Reform Party Member of Parliament for Surry-White Rock-South Langley, B.C. in *Hansard* (4 May 1995) at 12192-93. Charitable status was apparently granted in 1993. See Peter Hadzipetros, "Sikh Militancy," *CBC News Online* (27 August 2003), available at <http://www.cbc.ca/news/background/airindia/sikh.html>.

<sup>ii</sup> *Ibid.*

<sup>iii</sup> See, e.g., Ken MacQueen, "Air India Arrests" *Maclean's Magazine* (13 November 2000). According to this story: "When moderates finally took over control of Surrey's Guru Nanak temple in 1996, president Balwant Singh Gill says they found virtually no financial records for the past 10 years, leading to unproven speculation that the institution, with its 31,000 voting members, had inadvertently financed the fight for Khalistan. The temple was rundown and heavily mortgaged - where a decade of donations went, Gill can only guess. 'I can say one thing,' he says. 'The first year we took over this temple, in 1996, we paid out all the mortgage, \$848,000 in one year. And we did some construction work. In the 10 years before, nothing had been done to the temple: no construction, no repairs, no renovation.'"

<sup>iv</sup> United States Department of Treasury, "Treasury Designates Benevolence International Foundation and Related Entities as Financiers of Terrorism" Press Release PO-3632 (19 November 2002), available at <http://www.treasury.gov/press/releases/po3632.htm>.

<sup>v</sup> Financial Transactions and Reports Analysis Centre of Canada, *FINTRAC Annual Report 2006*, at 19, available at <http://www.fintrac.gc.ca/publications/ar/2006/menu-eng.asp>.

<sup>vi</sup> Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Terms of Reference, (1 May 2006), paragraph (b)(iv), available at [http://epe.lac-bac.gc.ca/100/206/301/pcobcp/commissions/air\\_india/2010-07-23/www.majorcomm.ca/en/termsofreference/default.htm](http://epe.lac-bac.gc.ca/100/206/301/pcobcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/termsofreference/default.htm).

<sup>vii</sup> *Air India Flight 182: A Canadian Tragedy*, Final Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, (Ottawa: Her Majesty the Queen in Right of Canada,

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2010), available at [http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air\\_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/default.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/default.htm).

<sup>viii</sup> *Ibid.*, Vol. 5, Ch. VI “The Links Between the Charitable Sector and Terrorist Financing”, available at [http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air\\_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume5/vol5-chapt6.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume5/vol5-chapt6.pdf).

<sup>ix</sup> In the months after the terrorist attacks of September 11, 2001, the Canadian government moved swiftly to introduce various measures to constrain terrorist financing by adding several offences to the *Criminal Code*, renaming and amending the *Proceeds of Crime (Money Laundering) Act* to address terrorist financing as well as money laundering, and expanding the role of FINTRAC to combat terrorist financing. See Anita Indira Anand, “An Assessment of the Legal Regime Governing the Financing of Terrorist Activities” in Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Research Studies, Volume 2: Terrorism Financing, Charities, and Aviation Security* (Ottawa: Her Majesty in Right of Canada, 2010) at 125-129; and Kevin Davis, “Cutting off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?” in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, (Toronto: University of Toronto Press, 2001) at 299-319. In addition to these measures, the federal government also enacted the *Charities Registration (Security Information) Act* (CRSIA), S.C. 2001, c. 41, s. 113, providing for the denial or revocation of an organization’s charitable status where there are reasonable grounds to believe that its resources are used to support terrorism. For a discussion of this legislation (on which part of this article is based), see David G. Duff, “Charitable Status and Terrorist Financing: Rethinking the Proposed *Charities Registration (Security Information) Act*” in Daniels, et. al., *supra* at 321-37. More recently, the federal government introduced further measures to combat terrorist financing, including amendments to the federal *Income Tax Act* authorizing the Canada Revenue Agency (CRA) to disclose specific categories of information about charitable organizations to the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP) and FINTRAC: *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, S.C. 2006, c. 12.

<sup>x</sup> *Income Tax Act* R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) [as emended]; and *Charities Registration Security Information Act*, S. C. 2001, c. 41, s. 113.

<sup>xi</sup> U.K., 30 & 31 Victoria, c.3.

<sup>xii</sup> *Ibid.*, subsection 92(13).

<sup>xiii</sup> *Ibid.*, subsection 91(3), granting the Parliament of Canada authority to make laws for: “The raising of Money by any Mode or System of Taxation.”

<sup>xiv</sup> Patrick J. Monahan with Elie S. Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform*, (Toronto: York University, 2000) at

<sup>xv</sup> Arthur B.C. Drache, “The English Charity Commission Concept in the Canadian Context” (1997), 14 *The Philanthropist* 8.

<sup>xvi</sup> *Charitable Fund-Raising Act*, R.S.A. 2000, c. C.9 (Alberta); *The Charities Endorsement Act*, R.S.M. c. C60 (Manitoba); and *The Charitable Fund-Raising Business Act*, S.S. 2002, c. C-6.2 (Saskatchewan).

<sup>xvii</sup> Kenneth R. Goodman, “Standing on Guard for Thee: The Role of the Office of the Public Guardian and Trustee” (2002), 17 *The Philanthropist* 4.

<sup>xviii</sup> *Charities Accounting Act*, R.S.O. 1990, c. C.10. This legislation was first enacted in 1915, and was based on English law and legal practice prevailing at the time. For a general overview of this legislation, see Goodman, *supra* note 21. For a more detailed and critical examination of this regulatory regime, with specific recommendations for reform, see Ontario Law Reform Commission (OLRC), *Report on the Law of Charities*, Vol. 2 (Toronto: Queen’s Printer, 1996), chapter 17.

<sup>xix</sup> Monahan with Roth, *supra* note 14 at 7. See also Drache, *supra* note 15 at 10, explaining that “because complying with the tax rules is crucial to virtually all charities in Canada, *de facto* Revenue Canada has become the most important overseer.”

<sup>xx</sup> *Charities Accounting Act*, *supra* note 18, s. 4(g). According to the statute, the Superior Court may make an order to this effect, upon application by the Public Guardian and Trustee, if the charity “refuses or neglects to comply” with obligations to report information or submit its accounts to be examined by the Court, is determined to have “misapplied or misappropriated any property or fund” coming into its hands,

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has made “any improper or unauthorized investment” of charitable funds, or “is not applying any property, fund or money in the manner directed by the will or instrument” establishing a charitable purpose trust or charitable corporation. The statute also allows persons who allege a breach of a trust created for a charitable purpose to apply to the Superior Court, which may “make such order as it considers just for carrying out of the trust under the law.” *Ibid.*, s. 10(1).

<sup>xxi</sup> Monahan with Roth, *supra* note 14 at 97.

<sup>xxii</sup> Drache, *supra* note 15 at 10. See also OLRC, *supra* note 18, Vol. 1, at 262.

<sup>xxiii</sup> See, e.g., Canada Revenue Agency, “Government delivers innovative \$2 million program for charities and non-profit organizations,” News Release (31 October 2006), available at <http://www.cra-arc.gc.ca/nwsrm/rlss/2006/m10/nr061031b-eng.html>.

<sup>xxiv</sup> See, e.g., Canada Revenue Agency, “Charities Partnership and Outreach Program,” available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/fndng/menu-eng.html>, explaining that the “overall objective” of the Charities Partnership and Outreach Program is “to increase compliance by the charitable sector with relevant parts of the *Income Tax Act*.”

<sup>xxv</sup> ITA, ss. 188.1 and 188.2, applicable to taxation years after March 22, 2004. These “intermediate” measures are reviewed in Part II of this report.

<sup>xxvi</sup> See, e.g., Susan D. Phillips, “Governance, Regulation and the Third Sector: Responsive Regulation and Regulatory Responses” Paper Presented to the Annual Meeting of the Canadian Political Science Association, London, Ontario (2 June 2005). On the theory of responsive regulation more generally, see John Braithwaite, *Restorative Justice and Responsive Regulation*, (Oxford: Oxford University Press, 2002), chapter 2.

<sup>xxvii</sup> ITA, s. 149(1)(f).

<sup>xxviii</sup> ITA, s. 118.1. At the federal level, this credit is computed at the lowest marginal rate of tax for the first \$200 of total gifts claimed in the taxation year and the highest marginal rate for amounts exceeding \$200. Since the 2008 taxation year, the federal rate structure implies a credit of 15 percent on the first \$200 claimed each year and 29 percent on amounts over \$200. Most provinces and territories adopt a similar two-tiered rate structure for their charitable contributions tax credits, which generally range from 4 to 11 percent on the first \$200 and from 11.5 to 18.02 percent on amounts above this threshold. In Quebec, the credit is computed at a rate of 22% on the first \$2,000 claimed in the year, and 25% on amounts exceeding \$2,000.

<sup>xxix</sup> ITA, s. 110.1.

<sup>xxx</sup> ITA, ss. 38(a.1) and (a.2).

<sup>xxxi</sup> See ss. 38(a.1) and (a.2), s. 110.1(1)(a), and the definition of “total charitable gifts” in s. 118.1(1).

<sup>xxxii</sup> ITA, s. 149.1(1).

<sup>xxxiii</sup> For a review and critical evaluation of alternative rationales for the tax recognition of charitable contributions, see David G. Duff, “Tax Treatment of Charitable Contributions: Theory, Practice, and Reform” (2004), 43 *Osgoode Hall L.J.* 47 at 50-70.

<sup>xxxiv</sup> See, e.g., Lester M. Salamon, “Partners in Public Service: The Scope and Theory of Government-Non-profit Relations,” in Walter Powell, ed., *The Non-profit Sector: A Research Handbook* (New Haven, Conn.: Yale University Press, 1987) 99; and Rick Krever, “Tax Deductions for Charitable Donations: A Tax Expenditure Analysis” in Richard Krever and Gretchen Kewley, eds., *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes*, (Melbourne: Australian Tax Research Foundation, 1991) 1 at 8-13.

<sup>xxxv</sup> See, e.g., Krever, “Tax Deductions and Charitable Donations,” *supra* note 34 at 11-13; and David G. Duff, “Charitable Contributions and the Personal Income Tax: Evaluating the Canadian Credit” in Jim Phillips, Bruce Chapman, and David Stevens, eds., *Between State and Market: Essays on Charities Law and Policy in Canada*, (Montreal and Kingston: McGill-Queen’s University Press, 2001) 407 at 433-36.

<sup>xxxvi</sup> Department of Finance, *Tax Expenditures and Evaluations*, (Ottawa: Her Majesty the Queen in Right of Canada, 2009) at 15 and 23.

<sup>xxxvii</sup> *The Income War Tax Act, 1917*, 7-8 Geo 5, c. 28 (Can.), ss. 3(1)(c) (allowing a deduction for “amounts paid by the taxpayer during the year to the Patriotic and Red Cross Funds, and other patriotic and war funds approved by the Minister”) and 5(d) (exempting the income of “religious, charitable, agricultural and educational institutions”). Although the deduction for patriotic and war funds was repealed in 1920, a more general deduction for charitable donations was subsequently enacted in 1930: *An Act to amend the*

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*Income War Tax Act*, S.C. 1930, c. 24, s. 3, enacting s. 5(1)(j) of the *Income War Tax Act*, R.S.C. 1927, c. 97. This deduction remained until 1988, when it was replaced with a non-refundable credit for individuals under section 118.1 of the ITA. For a detailed history of federal supervision of charities under the ITA, see OLRG, *supra* note 18, Vol. 1, at 249-86.

<sup>xxxviii</sup> *An Act to amend the Income Tax Act*, S.C. 1966-67, c. 47, ss. 3 and 15, amending *Income Tax Act*, R.S.C. 1952, c. 148, ss. 27 and 125.

<sup>xxxix</sup> Although a decision to reject or revoke charitable status may be appealed to the Federal Court of Appeal under s. 172(3) of the ITA, the number of such appeals is extremely small. See *infra* note 68 and accompanying text.

<sup>xl</sup> Canada Revenue Agency, *Registered Charities Newsletter*, No. 31 (Winter 2009) at 3, available at <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-31/README.html>.

<sup>xli</sup> Statistics Canada, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations, 2003 revised*, (Ottawa: Minister of Industry, 2005), available at [http://www.nonprofitscan.ca/pdf/NSNVO\\_Report\\_English.pdf](http://www.nonprofitscan.ca/pdf/NSNVO_Report_English.pdf), at 8.

<sup>xlii</sup> *Ibid.* at 34, reporting that 41.5% of nonprofit and voluntary organizations in Canada in 2003 had annual revenues less than \$30,000 and 21.3% had annual revenues of \$30,000 to \$99,000.

<sup>xliii</sup> *Ibid.* at 36, Table 3.8, reporting that 54% of nonprofit and voluntary organizations in Canada in 2003 had no paid staff.

<sup>xliv</sup> For foundations registered before February 16, 1984, the distinction between a public and private foundation depends on a threshold of 75% of contributions of capital by a single person or group of persons not dealing with each other at arm's length, rather than 50%.

<sup>xlvi</sup> Subsection 149.1(6) relaxes this requirement by considering a charitable organization to be devoting its resources to charitable activities carried on by it where it carries on a related business, disburses not more than 50% of its income to qualified donees, or disburses income to a registered charity with which it is "associated". According to s. 149.1(7) of the ITA, the Minister may on application designate a registered charity as a charity associated with one or more registered charities where "the Minister is satisfied that the charitable aim or activity of each of the registered charities is substantially the same ...."

<sup>xlvi</sup> Canada Revenue Agency, RC4106 "Registered Charities Operating Outside Canada" available online at <http://www.cra-arc.gc.ca/E/pub/tg/rc4106/README.html>. According to this document, "[t]hese arrangements can be an acceptable devotion of the charity's resources to its 'own activities' providing: the charity has obtained reasonable assurance before entering into agreements with individuals or other organizations that they are able to deliver the services required by the charity (by virtue of their reputation, expertise, years of experience, etc.); all expenditures will further the Canadian charity's formal purposes and constitute charitable activities that the Canadian charity carries on itself; an adequate agreement is in place [as suggested in the document]; the charity provided periodic, specific instructions to individuals of organizations as and when appropriate; the charity regularly monitors the progress of the project or program and can provide satisfactory evidence of this ...; and, where appropriate, the charity makes periodic payments on the basis of this monitoring (as opposed to a single lump sum payment) and maintains the right to discontinue payments at any time if not satisfied."

<sup>xlvi</sup> See the definition of "charitable purposes" in s. 149.1(1) of the ITA.

<sup>xlvi</sup> *British Launderers' Research Association v. Borough of Hendon Rating Authority*, [1949] 1 K.B. 462 (C.A.), cited with approval by the Supreme Court of Canada in *Guaranty Trust Co. of Canada v. M.N.R.*, [1967] S.C.R. 113 at 143 (hereafter *Guaranty Trust*).

<sup>xlvi</sup> *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10 at para. 152.

<sup>i</sup> *Ibid.* at para.194.

<sup>ii</sup> [1891] A.C. 531 at 583.

<sup>iii</sup> See, e.g., *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, *supra* note 49 (concluding that the provision of support to immigrant and visible minority women was not charitable under the *Pemsel* test); and *A.Y.S.A. Amateur Youth Soccer Association v. Canada*, [2008] 1 C.T.C. 32, 2007 D.T.C. 5527 (S.C.C.) (concluding that the promotion of sport, in and of itself, is not a charitable purpose).



- liii *Verge v. Somerville*, [1924] AC 496 at 499, cited with approval in *Guaranty Trust*, *supra* note 53 at 141.
- liv See, e.g., *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406 at 442, concluding that “the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that the gift to secure the change is a charitable gift”; and *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 C.T.C. 126, 98 D.T.C. 6196 (F.C.A.) at para. 12 (hereafter *Human Life International*), stating that “Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community?” For a conceptual discussion of the political purposes doctrine in the law of charities, see Abraham Drassinower, “The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis,” in Phillips et. al., eds., *Between State and Market*, *supra* note 35, 288.
- lv See, e.g., *Challenge Team v. Revenue Canada*, [2000] 2 C.T.C. 352, 2000 D.T.C. 6242 (F.C.A.).
- lvi Canada Revenue Agency, T4063 “Registering a Charity for Income Tax Purposes” available at <http://www.cra-arc.gc.ca/E/pub/tg/t4063/README.html> (last updated 9 December 2008) at 9. See also *ibid.* at 7-8, stating that: “For an organization to be registered, its purposes have to fall within one or more of the following categories: the relief of poverty; the advancement of education; the advancement of religion; or certain other purposes that benefit the community in a way the courts have said are charitable.”
- lvii *Ibid.* at 7, explaining that “To be registered as a charity, an organization also has to meet a public benefit test. To qualify under this test, an organization must show that: its activities and purposes provide a tangible benefit to the public; and those people who are eligible for benefits are either the public as a whole, or a significant section of it, in that they are not a restricted group or one where members share a private connection, such as social clubs or professional associations with specific membership.”
- lviii *Ibid.* at 5, stating that: “Political purposes are not charitable and an organization will not qualify for charitable registration if any of its purposes are political.”
- lix Canada Revenue Agency, T2050 “Application to Register a Charity Under the *Income Tax Act*” available at <http://www.cra-arc.gc.ca/E/pbg/tf/t2050/README.html> (last modified 22 July March 2009).
- lx *Scarborough Community Legal Services v. M.N.R.*, [1985] 1 C.T.C. 98, 85 D.T.C. 5102 (F.C.A.) at para. 10, *per* Marceau J.
- lxi *Ibid.* at para. 11, *per* Marceau J.; and at para. 27, *per* Urie J. Dissenting, Heald J. concluded that the decision to deny registered status was a “quasi-judicial decision” such that it should have been given an opportunity to respond before its application was rejected. *Ibid.* at paras. 35 and 39.
- lxii Canada Revenue Agency, *Registered Charities Newsletter*, No. 25 (Fall 2005) at 3, available at <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-25/charitiesnews25-e.pdf>.
- lxiii *Ibid.*
- lxiv ITA, s. 168(4), added by S.C. 2005, c. 19, s. 38(1), applicable only to FTD letters issued by the CRA after 12 June 2005.
- lxv ITA, s. 165(3).
- lxvi ITA, s. 149.1(22), added by S.C. 2005, c. 19, s. 35(6), applicable only after 12 June 2005.
- lxvii ITA, ss. 172(3)(a.1) and 180(1)(a).
- lxviii From 1987 to 1996, for example, the number of appeals averaged only eight per year. Lorne Sossin, “Regulating Virtue: A Purposive Approach to the Administration of Charities” in Phillips, et. al. *Between State and Market*, *supra* note 35, 373 at 387.
- lxix Canada Revenue Agency, *Registered Charities Newsletter*, No. 28 (Summer 2007) at 4, available at <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-28/README.html>.
- lxx Canada Revenue Agency, *Registered Charities Newsletters*, Nos. 15, 19, 23, 27 28, and 31, available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/nwsltr/menu-eng.html>. The figures contained in this table include the most recent that are publicly available.
- lxxi Monahan with Roth, *supra* note 14 at 12.
- lxxii Canada Revenue Agency, Charities Directorate, Legislative Policy and Regulatory Affairs Branch, Assessment, Determinations and Monitoring (ADM) Division, *Year End Report 2006/2007*, cited in *Air India Flight 182: A Canadian Tragedy*, Volume V: Terrorist Financing, *supra* note 7. at 208.
- lxxiii CRA Document on Managing and Mitigating the Risk of Terrorist Involvement, cited in *ibid* at 208.

- lxxiv RCMP, 2005-06 Departmental Performance Report, cited in *ibid.* at 208.
- lxxv Canada Revenue Agency, T3010B “Registered Charity Information Return” available at <http://www.cra-arc.gc.ca/E/pgb/tf/t3010b/README.html> (last modified 18 February 2009). Form T3010B replaced T3010A in January 2009 in order to simplify the reporting process for registered charities; see Canada Revenue Agency, *Registered Charities Newsletter*, No. 21 (Winter 2008) at 13 available at <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-31/README.html>.
- lxxvi ITA, s. 149.1(2)(a) (charitable organization cannot carry on an unrelated business), ss. 149.1(3)(a), (c) and (d) (public foundation cannot carry on an unrelated business, cannot acquire control of any corporation, and cannot incur debts other than those specified), and ss. 149.1(4)(a), (b) and (c) (private foundation cannot carry on any business, cannot acquire control of any corporation, and cannot incur debts other than those specified).
- lxxvii ITA, ss. 149.1(2)(b), (3)(b), and 4(b), and the definition of “disbursement quota” in ss. 149.1(1).
- lxxviii ITA, s. 248(1) definition of “business”.
- lxxix *Alberta Institute on Mental Retardation v. The Queen*, [1987] 2 C.T.C. 70, 87 D.T.C. 5305 (F.C.A.) at para. 15, suggesting that the commercial activity at issue (collecting goods from donors and transferring them in exchange for a fee and expenses to a separate commercial enterprise which sold the goods for profit) had “a very close connection with the charity” because all of the revenues collected through the activity were allocated to the foundation’s charitable purposes. See also *Earth Fund / Fond pour la Terre v. M.N.R.*, [2003] 2 C.T.C. 10, 2003 D.T.C. 5015 (F.C.A.), rejecting the taxpayer’s argument that a proposed lottery business would constitute a related business solely because revenues from the lottery would be devoted exclusively to charitable purposes. See also the definition of “related business” in subsection 149.1(1) of the ITA, which extends the judicially-determined meaning to include “related business” to include “a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment.” For a useful discussion of the advantages and disadvantages of allowing charities to engage in commercial activities, see Kevin Davis, “The Regulation of Social Enterprise” in Phillips, et. al., *Between State and Market*, *supra* note 35, 479.
- lxxx Under subsection 149.1(5), the Minister may, on application by the charity, reduce this percentage. The 2010 Federal Budget proposes to eliminate the charitable expenditure rule and increase the asset threshold for the capital expenditure rule from \$25,000 to \$100,000. Department of Finance Canada, *Budget 2010: Leading the Way on Jobs and Growth* (Ottawa: Her Majesty the Queen in Right of Canada, March 4, 2010) at 349-352.
- lxxxi ITA, ss. 149.1(2)(a), 149.1(3)(a), (c) and (d), and 149.1(4)(a), (b) and (c).
- lxxxii ITA, ss. 149.1(2)(b), (3)(b), and 4(b).
- lxxxiii ITA, s. 149.1(4.1)(a).
- lxxxiv ITA, s. 149.1(4.1)(b).
- lxxxv ITA, s. 149.1(4.1)(c).
- lxxxvi ITA, s. 168(1)(d).
- lxxxvii ITA, s. 168(1)(e).
- lxxxviii *Renaissance International v. M.N.R.*, [1982] C.T.C. 393, 83 D.T.C. 5024 (F.C.A.) at para. 17, *per* Pratte J. (hereafter *Renaissance International*). See also *Lord’s Evangelical Church of Deliverance & Prayer of Toronto v. The Queen*, [2005] 1 C.T.C. 135, 2004 D.T.C. 6746 (F.C.A.) at para. 12.
- lxxxix *Renaissance International*, *supra* note 88 at para. 16.
- xc ITA, s. 168(4), added by S.C. 2005, c. 19, s. 38(1), applicable to notices issued by the Minister of National Revenue after June 12, 2005.
- xc1 ITA, s. 165(3).
- xcii ITA, ss. 172(3)(a.1) and 180(1)(a).
- xciii ITA, s. 180(3).
- xciv *Human Life International*, *supra* note 54 at para. 9, explaining that “the taxpayer is in the best position to provide information about his own affairs.”
- xcv ITA, s. 168(2).
- xcvi ITA, s. 188(1.1). See also the definition of a charity’s “winding-up period” in s. 188(1.2), the definition of an “eligible donee” in s. 188(1.3), s. 188(1) which deems the charity’s taxation year to end when it is issued a notice of revocation, and s. 189(6.1) which requires the charity to file a return and pay

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tax under s. 188(1.1) within a year after receiving the notice of revocation. In addition to these provisions, s. 188(2.1) permits the non-application of this penalty tax where the Minister abandons its intention to revoke the charity's registered status or re-registers the charity within a year from when the notice of revocation is issued, or the charity has within the year filed all information returns that were required to be filed before that time and paid all amounts owing in respect of taxes, penalties and interest.

<sup>xcvii</sup> Canada Revenue Agency, *Registered Charities Newsletters*, Nos. 15, 19, 23, 27 and 31, available at <http://www.cra-arc.gc.ca/tx/chrts/cmmnctn/nwsltrts/menu-eng.html>. The figures contained in this table include the most recent that are publicly available.

<sup>xcviii</sup> Canada Revenue Agency, *Registered Charity Newsletter*, No. 11 (Autumn 2001), available at <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-11/news11-e.html>.

<sup>xcix</sup> For 2005 and subsequent years, this decrease is undoubtedly partly explained by the enactment of a \$500 penalty tax for late-filed information returns under subsection 188.1(6) of the ITA. See *infra* notes 103-08 and accompanying text.

<sup>c</sup> Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*, (February 1999) at 68.

<sup>ci</sup> Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *supra* note 7 at 261.

<sup>cii</sup> *Ibid.* at 262.

<sup>ciii</sup> See, e.g., OLRC, *supra* note 18, Vol. 1 at 378; Joint Tables, *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*, (August 1999) at 58-59; Panel on Accountability and Governance in the Voluntary Sector, *supra* note 100 at 72; Monahan with Roth, *supra* note 14 at 85; and Joint Regulatory Table, *Strengthening Canada's Charitable Sector: Regulatory Reform*, (Ottawa: Voluntary Sector Initiative, March 2003).

<sup>civ</sup> Canada, Department of Finance, *The Budget Plan 2004: A New Agenda for Achievement*, (Ottawa: Her Majesty the Queen in Right of Canada, 2004) at 351.

<sup>cv</sup> ITA, s. 188.1(4), imposing a penalty tax on the charity equal to 105% of the amount of this benefit or 110% of the amount of the benefit if the charity was assessed for this penalty tax within the previous 5 years. For the purpose of this provision, s. 188.1(5) generally defines an "undue benefit" to include "a disbursement by way of a gift or the amount of any part of the income, rights, property or resources of the charity that is paid, payable, assigned or otherwise made available for the personal benefit of any person who is a proprietor, member, shareholder, trustee or settlor of the charity, who has contributed or otherwise paid into the charity more than 50% of the capital of the charity, or who does not deal at arm's length with such a person or with the charity ...."

<sup>cvi</sup> ITA, ss. 118.1(7) and (8), imposing a penalty tax on the charity equal to 5% of the amount of the gift, or 10% of the amount of the gift if the charity was assessed for this penalty within the previous five years.

<sup>cvii</sup> ITA, s. 118.1(9), imposing a penalty tax equal to 125% of the amount of the gift for which the receipt is issued.

<sup>cviii</sup> ITA, s. 118.1(11), imposing a tax on each of the charities jointly and severally equal to 110% of the fair market value of the property.

<sup>cix</sup> ITA, s. 188.2(1)(a) and (b).

<sup>cx</sup> ITA, s. 188.2(1)(c).

<sup>cxii</sup> ITA, s. 188.2(2)(a).

<sup>cxiii</sup> ITA, s. 188.2(2)(b).

<sup>cxiv</sup> ITA, s. 188.2(3).

<sup>cxv</sup> ITA, s. 189(8).

<sup>cxvi</sup> ITA, s. 169(1).

<sup>cxvii</sup> ITA, s. 188.2(4).

<sup>cxviii</sup> ITA, s. 188.2(5).

In the Final Report of the Air India Inquiry, Justice Major recommended that the CRA publish this information where practicable. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *supra* note 7 at 262.

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<sup>cxix</sup> *An Act respecting the registration of charities and security information and to amend the Income Tax Act*, First Session, Thirty-seventh Parliament, 49-50 Elizabeth II, 2001 (First Reading, 15 March 2001) (hereafter “Bill C-16”).

<sup>cxx</sup> G-7 Ministerial Conference on Terrorism (Paris, 30 July 1996), “Agreement on 25 Measures”, Resolution 19 (calling on all States to; “Prevent and take steps to counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have, or claim to have charitable, social or cultural goals, or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing, and racketeering.”); and General Assembly resolution 51/210 (17 December 1996), paragraph 3(f) (calling on all States to take steps “to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities ...”).

<sup>cxxi</sup> Adopted by the General Assembly of the United Nations in resolution 54/109 on 9 December 1999, and signed by Canada in February 2000.

<sup>cxxii</sup> *The Report of the Special Senate Committee on Security and Intelligence*, Chair: Hon. William M. Kelly, (January 1999), Recommendation 13 (“that consideration be given to amending the *Income Tax Act* to allow Revenue Canada [now the Canada Customs and Revenue Agency] to deny charitable registration to any group on the basis of a certificate from the Canadian Security Intelligence Service that the group constitutes a threat to the security of Canada.”).

<sup>cxxiii</sup> *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, First Session, Thirty-seventh Parliament, 49-50 Elizabeth II, 2001 (First Reading, 15 October 2001).

<sup>cxxiv</sup> CRSIA, s. 2(1).

<sup>cxxv</sup> See also CRSIA, s. 5(4), stipulating that an order on an application under subsection 5(3) is “not subject to an appeal or review by any court at the instance of a party to the application.”

<sup>cxxvi</sup> CRSIA, s. 7(1).

<sup>cxxvii</sup> CRSIA, s. 7(2).

<sup>cxxviii</sup> CRSIA, s. 6(a) and (c), stipulating that the judge shall hear the matter and “with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit”.

<sup>cxxix</sup> CRSIA, s. 6(d).

<sup>cxxx</sup> CRSIA, s. 6(h).

<sup>cxxxi</sup> CRSIA, s. 6(i).

<sup>cxxxii</sup> CRSIA, s. 6(b) and (h), stipulating that “the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person” and that the summary of the information or evidence that the judge provides to the applicant or registered charity shall “not include anything that in the opinion of the judge would be injurious to national security or endanger the safety of any person if disclosed”. See also s. 6(e) and (g), stipulating that the judge shall, when requested by the Minister of Public Safety and Emergency Preparedness or the Minister of National Revenue, “hear all or part of the information or evidence in the absence of the applicant or registered charity named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person” and that this information or evidence “shall not be included in the summary of the information or evidence that enables it to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or endanger the safety of any person”.

<sup>cxxxiii</sup> CRSIA, s. 6(j).

<sup>cxxxiv</sup> CRSIA, s. 8(3).

<sup>cxxxv</sup> CRSIA, s. 10(3).

<sup>cxxxvi</sup> CRSIA, s. 10(5).

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- cxxxvii CRSIA, s. 10(5)(a).
- cxxxviii CRSIA, s. 10(5)(b).
- cxxxix CRSIA, s. 10(6).
- cxl CRSIA, s. 12.
- cxli CRSIA, ss. 11(1) and (2).
- cxlii CRSIA, s. 11(5).
- cxliii CRSIA, s. 12.
- cxliv Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act*, (February 2007) at 60, reporting on statements by the Minister of Public Safety and the Minister of Justice and Attorney General that “to date, the power to issue a certificate under the CRSIA has not been used.” See also *ibid.* at 34, reporting that “[t]o the Subcommittee’s knowledge, no certificates have been issued under this legislation.” See also Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *supra* note 75 at 217, reporting that “No Certificate had been issued under the CRSIA as of January 2009.”
- cxlv Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 38<sup>th</sup> Parliament, 1<sup>st</sup> Session, Evidence (18 May 2005) 1545 (statement by Mr. Michel Dorais, Commissioner, Canada Customs and Revenue Agency).
- cxlvi *Ibid.* at 1535. See also *ibid.* at 1555, stating that “these powers can deter some organizations which may consider registering as charities in Canada for terrorist purposes.”
- cxlvii Terrance S. Carter, “Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law” (2004), 19:1 *The Philanthropist* 43 at 44.
- cxlviii Form T2050, *supra* note 59.
- cxlix ITA, s. 149.1(14). The information return for this purpose is form T3010B, *supra* note 75.
- cl ITA, s. 231.1(1).
- cli See, e.g., *Redemer Foundation v. M.N.R.*, [2008] 5 C.T.C. 135, 2008D.T.C. 6474 (judicial authorization not required to obtain donor list since information requested was to determine whether registered charity was in compliance with the ITA). Where the premises or place of business referred to in paragraph 231.1(1)(c) is a dwelling house, subsections 231.1(2) and (3) require the Minister to apply to a judge of the superior court for a warrant authorizing entry.
- clii *R. v. Jarvis* (2002), 3 S.C.R. 757.
- cliii ITA, s. 231.2(1).
- cliv ITA, s. 231.3(1). According to subsection 231.3(3), a judge may issue the warrant where “the judge is satisfied that there are reasonable grounds to believe that (a) an offence under this Act was committed; (b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and (c) the building, receptacle or place specified in the application is likely to contain such a document or thing.”
- clv Canada Revenue Agency, *Registered Charities Newsletters*, Nos. 15, 19, 23, 27 and 31 available at <http://www.cra-arc.gc.ca/tx/chrts/cmmnctn/nwslttrs/menu-eng.html>. The figures contained in this table include the most recent that are publicly available.
- clvi Monahan with Roth, *supra* note 14 at 11.
- clvii Sossin, “Regulating Virtue,” *supra* note 68 at 388.
- clviii Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP’s Security Activities*, (Ottawa: Her Majesty the Queen in Right of Canada, 2006) at 190. See also Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *supra* note 148 at 1630 (statement by Ms. Elizabeth Tromp, Director General, Charities Directorate, Policy and Planning Branch, Canada Customs and Revenue Agency).
- clix *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17,,s. 55(3)(c), added by S.C. 2006, c. 12, s. 26(4), assented to 14 December 2006.
- clx Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *supra* note 158 at 190.
- clxi ITA, s. 241(10).
- clxii ITA, s. 241(3).
- clxiii R.S.C. 1985, c. 23. See ITA, s. 241(4)(e)(iv).

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- clxiv *Supra* note 6. See ITA, s. 241(4)(e)(v).
- clxv ITA, s. 241(3.1).
- clxvi Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *supra* note 161 at 191.
- clxvii ITA, s. 241(3.2), added by S.C. 1998, c. 19, s. 65(1), applicable on Royal Assent, June 18, 1998.
- clxviii Canada, Department of Finance, *Budget 1997: Building the Future for Canadians*, (Ottawa: Her Majesty the Queen in Right of Canada, 1997) at 199
- clxix S.C. 2001, c. 11, s. 33, in force on December 24, 2001.
- clxx Added by S.C. 2006, c. 12, s. 45(2), in force on February 10, 2007.
- clxxi ITA, s. 241(10), added by S.C. 2006, c. 12, s. 45(3), assented to December 13, 2006..
- clxxii *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, S.C. 2006, c. 12, s. 45, assented to December 13, 2006.
- clxxiii *Ibid.*
- clxxiv ITA, s. 241(10), added by S.C. 2006, c. 12, s. 45(3), assented to December 13, 2006.
- clxxv *Ibid.*
- clxxvi In this respect, see Financial Action Task Force on Money Laundering, *Combating the Abuse of Non-Profit Organisations: International Best Practices*, (11 October 2002), available at <http://www.fatf-gafi.org/dataoecd/53/53/34260889.pdf>, at para.1, describing non-profit organizations as “a crucial weak point” in the global struggle to stop terrorist financing at its source. See also Financial Task Force on Money Laundering, *Interpretative Note to Special Recommendation VIII: Non-Profit Organizations*, (15 February 2006), available at <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>, at para. 2, explaining that terrorist organizations have “taken advantage” of various characteristics of non-profit organizations (NPOs), including the public trust that they enjoy, in order to “infiltrate the sector and misuse NPO funds and operations to cover for or support terrorist activity.”
- clxxvii See, e.g., Financial Task Force on Money Laundering, *Interpretative Note to Special Recommendation VII*, *supra* note 176 at para. 1, explaining that misuse of non-profit organizations for terrorist financing “not only facilitates terrorist activity but also undermines donor confidence and jeopardises the very integrity of NPOs.”
- clxxviii *Supra* note 121.
- clxxix The FATF was established by the G-7 Summit held in Paris in 1989, when it was given the responsibility to examine money laundering techniques and trends, review action which has already been taken at the national and international level, and suggest further measure to combat money laundering. After the attacks of September 11, 2001, the mandate of the FATF was expanded to include measures to prevent terrorist financing. The FATF currently includes 34 member countries. See [http://www.fatf-gafi.org/pages/0,3417,en\\_32250379\\_32236836\\_1\\_1\\_1\\_1\\_1.00.html](http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1.00.html).
- clxxx CRSIA, s. 2(1).
- clxxxi FATF, *Combating the Abuse of Non-Profit Organisations: International Best Practices*, *supra* note 176 at para. 5.
- clxxxii Nolan Quigley and Belinda Pratten, *Security and Civil Society: The Impact of Counter-Terrorism Measures on Civil Society Organisations*, (London: National Council for Voluntary Organisations, 2007), available at <http://www.ncvo-vol.org.uk/?id=3906> at 7.
- clxxxiii See, e.g., *ibid.* at 9.
- clxxxiv *Constitution Act 1982*, Schedule B to *Canada Act 1982* (U.K.), s. 2, listing: “(a) freedom of conscience and religion; freedom of thought, belief, opinion and expression ...; (c) freedom of peaceful assembly; and (d) freedom of association.”
- clxxxv See *supra* notes 42-43 and accompanying text (reporting on the small size of most registered charities and their heavy reliance on volunteers).
- clxxxvi In Canada, for example, the CRA reports that only 14 organizations have been denied charitable status due to connections with terrorist activities, no certificates have been issued under the CRSIA and the CRA has provided information to the RCMP’s Anti-Terrorist Financing Group in relation to the certificate process only “on a very few occasions.” CRA Document on Managing and Mitigating the Risk of Terrorist Involvement, *supra* note 73; and Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *supra* note 158 at 190. In the United Kingdom, the Charity Commission’s Operational

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Guidance on Charities and Terrorism reports that “the incidence of charity involvement with terrorist organizations is very rare.” Charity Commission, *Operational Guidance: Charities and Terrorism*, (28 January 2003), available at <http://www.charity-commission.gov.uk/supportingcharities/ogs/g096.asp>.

<sup>clxxxvii</sup> See, e.g., Quigley and Pratten, *supra* note 182, emphasizing that the charitable sector should be viewed as “part of the solution” to global terrorism, not part of the problem. See also OMB Watch, *Safeguarding Charity in the War on Terror: Anti-terrorism Financing Measures and Nonprofits*, (October 2005) at 11, concluding that “the government should recognize the positive role nonprofits play in the campaign against international violence and terrorism.”

<sup>clxxxviii</sup> See, e.g., Quigley and Pratten, *supra* note 182 at 17. See also FATF, *Combating the Abuse of Non-Profit Organisations: International Best Practices*, *supra* note 176 at para. 5; and Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *supra* note 77 at 262 (emphasizing that government regulation should avoid harming or hindering the work of honest charitable organizations).

<sup>clxxxix</sup> *Supra* note 24.

<sup>cxc</sup> *Supra* note 46.

<sup>cxci</sup> Canada Revenue Agency, “Charities in the International Context,” available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/ntrntnl-eng.html> (last modified 16 October 2008), explaining that “[i]t can be difficult to be certain exactly what rules apply, which guidelines to follow, or if there are best practices that could inform how charitable activities should be carried out.” In contrast to the CRA, both the FATF and the U.S. Department of the Treasury have issued international best practices guidelines to prevent the use or misuse of charitable organizations for terrorist financing. See FATF, *Combating the Abuse of Non-Profit Organisations: International Best Practices*, *supra* note 176; and U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: *Voluntary Best Practices for U.S.-Based Charities*, available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>. The UK Charities Commission has also published a “compliance toolkit” to help charities understand concerns relating to terrorism and establish best practices. UK Charities Commission, *Compliance Toolkit: Protecting Charities from Harm*, (2009) available at <http://www.charity-commission.gov.uk/library/toolkitsum.pdf>.

<sup>cxcii</sup> See ITA, s. 241(3.2), discussed at *supra* notes 167-68, and accompanying text.

<sup>cxci</sup> See *supra*, text accompanying notes 156-157.

<sup>cxci</sup> See *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, *supra* note 159, s. 55(3)(c), discussed at *supra* note 159 and accompanying text; and ITA, ss. 241(1)(f.1), 241(9), and 241(9.1), discussed at *supra* notes 169-74 and accompanying text.

<sup>cxcv</sup> ITA, ss. 188.1 and 188.2, discussed at *supra* notes 104-18 and accompanying text.

<sup>cxevi</sup> *Supra* note 51 and accompanying text.

<sup>cxevii</sup> See the explanation of the constitutional framework governing charities in Canada at *supra*, Part I. This is in contrast to the much broader powers of the U.K. Charity Commission, which were deployed to suspend and then remove Abu Hamza from his position in the Finsbury Park Mosque. See Mark Sidel, “Terrorist Financing and the Charitable Sector: Law and Policy in the United Kingdom, the United States, and Australia” in Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Research Studies, Volume 2: Terrorism Financing, Charities, and Aviation Security*, *supra* note 9 at 163.

<sup>cxeviii</sup> *Supra* note 145.

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

<sup>cc</sup> For a critical evaluation of procedural aspects of the CRSIA, see Lorne Sossin, “The Intersection of Administrative Law with the Anti-Terrorist Bill” in Daniels, et. al., *supra* note 9, 419 at 422-25. For a recent evaluation of similar confidentiality provisions in the context of *Criminal Code* anti-terrorism provisions, see *Charkaoui v. Canada*, 2007 S.C.C. 9.

<sup>ccii</sup> ITA, ss. 188.1 and 188.2, discussed at *supra* notes 104-18 and accompanying text.

<sup>ccii</sup> CRSIA, s. 8(1).

<sup>cciii</sup> Terrance S. Carter, Sean S. Carter and Nancy E. Claridge, “Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for Balance” (2008), 6 *Int'l J. Civ. Soc'y L.* 42 at 66.

<sup>cciv</sup> *Supra* notes 104-18 and accompanying text.

<sup>ccv</sup> The Subcommittee on the Review of the Anti-Terrorism Act makes a similar recommendation in its Final Report, *supra* note 144 at 38, but limits this knowledge requirement to the entity engaging in terrorist activities, without also including the availability of resources to this entity. According to the

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Report: “The Subcommittee believes that it is unfair to penalize an organization when it had no reason to believe that its resources were assisting an entity engaged in terrorism.”

<sup>ccvi</sup> The Subcommittee on the Review of the Anti-Terrorism Act makes the same recommendation, *ibid.* at 36, despite suggesting that “a close reading” of subsection 4(1) of the CRSIA indicates that “for a certificate to be issued, the applicant or registered charity must have consciously and intentionally undertaken activities that directly or indirectly support terrorist activity.” The current author does not share this interpretation of the provision. However, see Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy*, Volume V: Terrorist Financing, *supra* note 8 at 261-262 where Mr. Justice Major finds that the need for a due-diligence defence is difficult to assess in the absence of any CRSIA Proceedings.

<sup>ccvii</sup> The Subcommittee on the Review of the Anti-Terrorism Act makes a similar recommendation in its Final Report, *supra* note 144 at 36.