FUNDING TERRORISM AND CHARITIES (PARTS 1, 2, AND 3)

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SUMMARY

THE FOLLOWING ARTICLE WAS PREPARED BY BLAKE BROMLEY FOR THE Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 in support of his personal testimony in Ottawa on October 26, 2007. This article will be published in 3 consecutive issues of *The Philanthropist:* the first installment will be the introduction plus parts 1, 2, and 3; the second installment will be part 4: "Ways Forward"; and, the third installment will be the text of his letter to David Walker, Development Manager, Compliance and Support Charity Commission: "Comments on Charity Commission Draft Counter-Terrorism Strategy."

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INTRODUCTION

You have invited me to appear[1] as a witness in front of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, in order to assist the Commission in its mandate of "making findings and recommendations as to whether Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations." You have asked me to provide information based on my legal knowledge and personal experience of fundraising by charities, and the possible role that charities play in funding terrorist activities or otherwise facilitating terrorism. These are very complex and difficult issues. There is a danger that by outlining some of the ways that Canada's existing legal framework facilitates fundraising for terrorism, my evidence might educate those who are not aware of existing opportunities. I have not volunteered to provide evidence to this Inquiry. However, given the tragedy of the bombing of Air India Flight 182 and the lives lost, as well as the suffering that it has inflicted on family members and friends, it is my moral duty to do whatever is possible to prevent such a tragedy from occurring in the future. I begin by paying my respects to those who died and giving my condolences to their family members and friends who remain.

I. QUALIFICATIONS

You have asked me to describe my professional qualifications with regard to charities and fundraising. I am a British Columbia lawyer who has practiced almost exclusively in the field of charities for more than 25 years. Currently I am the President of the Benefic Group and a Principal of Benefic Lawyers. To be Benefic means "to do or produce

good." The charitable sector is divided primarily between organizations that "do good" by carrying on their own charitable activities, and organizations that "produce good" by funding the charitable endeavours of other charities. The *Income Tax Act (ITA*) describes the "doers" of good as charitable organizations. I have incorporated and registered more than 200 charitable organizations. The *ITA* describes the "producers" of good as charitable foundations. I have incorporated and registered nearly 400 charitable foundations. It is important to have a clear understanding of the difference between charitable organizations and charitable foundations when inquiring into the separate issues of whether charities are directly engaged in terrorist activities, and whether they are funding other organizations, which carry on terrorist activities. It is also important to understand the increasing use of nonprofit organizations (NPOs), of which I have incorporated nearly 100 in recent years.

A great deal of my time is spent doing tax planning for very large and sophisticated charitable donations. For the last 15 years, I have advised on more than $100 million of charitable donations completed in each year. I have also advised clients on additional billions of dollars of testamentary charitable gifts. Having spoken with and advised thousands of donors over the years, I have come to understand that giving is motivated much more by unquantifiable factors such as subjective personal experience and religious teaching than by the quantifiable tax savings that are generated by clever tax planning. Consequently, I would encourage this Inquiry to spend time looking at the "theology of giving," which informs donors to Sikh temples, Islamic mosques, Jewish synagogues, and Christian churches. In an Inquiry of this nature, understanding the religious laws on giving to charities is as important as understanding the common law and tax law.

My perspective on charitable activities and fundraising is not confined to Canada. As a member of the International Academy of Estate and Trust Lawyers, I have a significant amount of knowledge on the most effective ways of moving both personal assets and charitable donations to foreign jurisdictions for tax planning purposes. I have frequently been a speaker at International Bar Association meetings on international tax planning involving charities. I also speak regularly at international offshore tax planning conferences on the philanthropy component of wealth planning. In each of the last 20 years I have likely been to Europe or Asia a minimum of five times, with less frequent trips to Africa and Australia. Last year alone I was in Asia eight times and in Europe seven times. I have come to these hearings from Vancouver via Beijing, Singapore, Kuala Lumpur, and London. Almost all of this travel relates to charities.

In my travels I actively seek information on the legal and tax provisions relating to charities and donations in other countries. It is ironic that, from the perspective of this Inquiry, my first exposure to using banking or money laundering legislation to control the international flow of charity dollars occurred twenty years ago in India. More significantly, this Indian legislation aimed at restricting the flow of charitable funds to finance terrorism was passed a quarter century before the post-9/11 global war on terrorism, and it was aimed specifically at Canadian donors supporting the political cause espoused by the bombers of Air India Flight 182. India was worried about donations coming from Canadian charities to fund the political struggle in Khalistan. Nine years before the bombing of Air India Flight 182, India passed the *Foreign Contributions (Regulation) Act, 1976* to regulate the acceptance and utilization of charitable contributions from foreign

countries. Canada did not pass anti-terrorism legislation until sixteen years after the bombing of Air India Flight 182. It is noteworthy and troubling that our anti-terrorism legislation was enacted in response to the American tragedy of 2001, rather than the Canadian tragedy of 1985.

My experience in the charitable field extends to advising governments outside of Canada on drafting laws intended to enable and facilitate the creation of civil society organizations and the making of charitable donations. In my opinion, the destruction of the Berlin Wall (1989) set in motion fundamental changes to the evolution of the international charitable sector, which are important to consider when studying the paradigm shift in the regulatory framework of international charity since 9/11. Beginning in 1989, I made numerous trips to the Soviet Union, working with the Drafting Committee on the Law of Charity, and was named as a foreign legal advisor on the Law of Charity subsequently passed by the Russian Duma. I have also advised governments and activists in Vietnam, Hungary, Poland, Czechoslovakia, and South Africa on the laws governing civil society organizations.

The country where I have been most involved in advising on laws relating to charitable organizations is the People's Republic of China. Just months after the confrontation in Tiananmen Square on June 4, 1989, I was invited by China's Ministry of Civil Affairs to advise the officials responsible for drafting a proposed law governing civil society organizations. I was in Beijing in January 1990, consulting with the Chinese government on the day that the curfew preventing people from gathering in Tiananmen Square was removed. That night I walked silently through a very somber Tiananmen Square, watching the faces of local people who had come to remember the tragic incidents, which followed after the Students for a Democratic Society mobilized resistance to the government.

This work has convinced me that charities are at the epicenter of political, religious, environmental, and economic confrontation in societies without regard to geography or ideology. My experience is that civil society organizations and charities are always involved when there is political unrest or confrontation with government. Frequently, this confrontation will involve violence, and the question of whether the government or the activists are carrying out terrorist activity will depend on the political views of the commentator.

Terrorism is not simply an abstract concept to me; it is something that I have experienced. When I was a student at the University of Singapore, I spent the summers of 1970 and 1971 working for a charitable organization in Vietnam. This was during the height of the war and my job involved a great deal of driving in Saigon. I learned that my survival might depend on how alert I was to human bombs, usually young people riding motorcycles with C-4 explosives taped to their bodies. Later on, prior to attending law school, I spent a year working with a charitable organization, in even more dangerous circumstances, in Mindanao in the southern Philippines. Nearly 30 years before President George H.W. Bush launched his global war on terrorism, this charitable organization was working to build peace between the fighting Muslims and Christians in an environment where there were open and frequent terrorist activities. The dynamic of terrorism is seldom more graphic than the sight of the head of a Muslim put up on a pole at the entrance to a Christian village, followed the next day by the Muslim retaliation of dis-

embowelling a pregnant Christian woman, in order to incite more hatred and increase the level of violence. My work involved digging wells, building basketball courts, and financing small economic projects in communities controlled by rebels and terrorists, in the hope that such projects would reduce inter-communal hatreds and relieve suffering. This work kept me so concerned about my physical safety (a colleague was hospitalized with seven bullet wounds after his jeep was ambushed by terrorists), I did not consider whether my efforts to do good could be characterized as "terrorist activities," as they would under the provisions of the *Anti-Terrorism Act* (*ATA*) today.

II. TERRORIST FINANCING UNDER THE EXISTING LEGAL FRAMEWORK GOVERNING CHARITIES IN CANADA

1. Incorporating a Charitable Organization

I have been asked to describe the process of incorporating and registering a charitable organization in a way that addresses the potential misuse of funds for terrorist purposes. In order to make my description more relevant to this Inquiry, let me hypothesize that Osama bin Laden has walked into my office and said that he wants to set up a Canadian registered charity to carry on his charitable works in Afghanistan and Pakistan. I will assume that I have no clue who bin Laden is or that he is interested in funding terrorism. Until such time as he determines a more appropriate name to inspire fundraising, I will open a file under the name "Osama bin Laden Charitable Organization (OBL Charity)."

It would be a reasonably simple task to draft the objects for OBL Charity so that they fall within the three classified heads of charity set out in *Pemsel*[2]: the relief of poverty, the advancement of religion, and the advancement of education. Bin Laden would likely begin by expressing his interest in advancing his religion, Islam. There would be no difficulty in drafting objects clauses which enabled OBL Charity to promulgate and practice Islam as a religion. It would also be easy to set down theological parameters in the objects clauses which excluded Shia Muslims and confined OBL Charity's interest to the strict Wahabi sect of Islam.

Bin Laden would almost certainly want to run madrassahs, the religious schools which are suspected of teaching religious doctrines that contribute to terrorism. It would be uncontroversial to add "advancement of education" objects which would be readily accepted by Charities Directorate and authorize him to fund and operate madrassahs.

Bin Laden would also describe his intention to provide food, medicines, potable water, and other provisions to the people who live in the mountains and villages in Afghanistan. These programs come within the "relief of poverty" head. Thus, all of Osama bin Laden's stated purposes would fall within the three classified heads of charity, which are presumed to be of benefit to the public.[3] They also mirror the religious, education, relief and development programs of charities which have no interest in furthering terrorism.

A. MUST CHARITABLE PURPOSES BE LEGAL?

Do I have duties as a lawyer that would require me to determine whether I should be raising red flags or refusing to act for Osama bin Laden? I could ask Osama bin Laden whether he anticipates that OBL Charity will be carrying on any illegal activities. The theoretical problem with this question is that most clients do not know how broadly the

ATA defines terrorist activities, and therefore do not believe they will be carrying on illegal activities. The practical problem with this question is that charities routinely carry on illegal activities and never think about their activities in terms of legality. Having worked with charities domestically and internationally both as a volunteer and a lawyer, I must confess that I have very serious doubts that the law of charity always excludes illegal activities, criminal activities, and even terrorist activities. If my doubts are well founded in law, or even justified by empirical evidence, then my evidence will complicate this Commission's obligation to make recommendations with regard to terrorist financing.

Certainly, the Federal Court of Appeal held in *Everywoman's Health Centre*[4] that an organization will not be charitable in law if its activities are illegal or contrary to public policy. However, charities advancing the Islamic religion are routinely registered in Canada, despite the fact that Islam teaches that polygamy is an approved form of marriage and the *Criminal Code of Canada* makes it clear that any form of polygamy is a criminal offence.[5] Similarly, I believe that Charities Directorate registers Catholic charities that have a purpose of saying masses for the dead, despite the historic common law rule that this is an illegal purpose.[6] As a lawyer I cannot reconcile the law as stated in *Everywoman's* with my experience with Charities Directorate. Nor am I convinced that Charities Directorate is wrong to register Islamic and Catholic charities that carry out these "illegal" activities. It is not clear that refusing to register on either of these grounds would survive a *Charter* challenge.

It is possible that the doctrine precluding illegal purposes is a correct statement of trust law but not a correct statement of charity law. There is no doubt that under trust law, a trust fails if it has illegal purposes. It is possible that this doctrine is a "relic" of trust law which does not apply to corporate charities. While the law of charity had its origin in the law of trusts, there are certainly aspects of trust law, such as doctrines related to the remuneration of trustees,[7] which are not necessarily part of charity law.[8]

In considering whether I would necessarily be required to concern myself with the potential of the OBL Charity carrying out illegal activities, it is useful to also consider the radical conduct of certain registered charities who support the environment or animal rights. Some of these organizations routinely engage in activities resulting in Court injunctions prohibiting such conduct as being illegal. There is not a single case in Canada where such an injunction has resulted in the offending charity's registration being revoked. There is a legitimate issue as to when these activities are carried out by the supporters of the charity rather than by the charity itself. However, this distinction is less helpful than it first appears because the Canada Revenue Agency (CRA) frequently takes the position that volunteers and supporters are a "resource" of a charitable organization.[9] Ironically, it is only if a charity actually tries to work within the law by lobbying to have a law changed that its registration is revoked for carrying on "political" activities and thus offending the law of charity.

The Federal Court of Appeal's statement that activities "contrary to public policy" are not charitable in law is even more difficult to support in practice. One thinks of the *Leonard Foundation* case in which the Ontario Court of Appeal held that scholarships that discriminate on a religious and gender basis are contrary to public policy in Canada. Since the *Leonard Foundation* case was decided, I am not aware that any charity which offers

scholarships in contravention of public policy guidelines has been denied registration or has had its registration revoked. I have certainly registered charities that offer scholarships based upon religion and gender. There is also a question about whether cases such as *Leonard Foundation* are even relevant to the registered charity scheme any more, now that the Supreme Court of Canada has held that "specific statutory definitions of charity in provincial legislation and decisions dealing with that definition do not dictate the meaning of charity under the *ITA*."[10]

In considering the public policy issue, it is important to remember that the issue in the *Pemsel* decision was whether it was charitable to "convert heathens" without necessarily feeding or clothing them. Charities are frequently involved in missionary activities that may not accord with the public policy of the day. I was born in China as a son of missionaries, so there is nothing in my analysis of the law that is intended to denigrate or criticize missionary activities. However, I suspect that advancing religion by converting "heathens" in less developed societies is one of many charitable activities which could be determined to be contrary to "public policy," as that term is understood in today's political and social environment.

Whether or not they are contrary to public policy, missionary activities are frequently illegal. During the Cold War, religious charities gained respect for illegally smuggling Bibles behind the Iron Curtain or the Red Curtain. The missionaries recently taken hostage in Afghanistan represent that tradition of charitable activity. In today's world, the illegal activities of charities are far more likely to involve the promotion of human rights in Zimbabwe or the protection of homosexuals in Iran than Bible trafficking. However, if charities do not operate illegally in Zimbabwe, one might as well just send the money to Robert Mugabe or abandon those most in need. Similarly, we will let the genocide continue unabated in Darfur if charities are restricted to carrying out humanitarian programs that do not break the laws of Sudan. In today's world, a charity might well contravene Canadian public policy by offending an ally in the war on terror, perhaps by too vigorously defending the rights of Afghan women. For these reasons, charities have historically operated without being restricted to carrying on exclusively legal activities.

B. THE REGULATOR AND ILLEGAL ACTIVITIES

The determination of whether the activities of an organization are charitable is made by Canada Revenue Agency (CRA) under the *Income Tax Act* (*ITA*). However, CRA is not an appropriate regulator to determine whether a charity's activities are legal or contrary to public policy, because the *ITA* is ambivalent as to whether the activities of taxpayers are illegal unless those activities contravene the *ITA* itself.

When CRA encounters illegal activity, it does not seek to stop it; it merely taxes it. For example, the *Criminal Code* makes it an offense to keep a common bawdy-house for prostitution. However, a CRA auditor who encounters revenue from prostitution has no jurisdiction to assess the legality of the activity. The role of CRA is merely to determine whether the illegal activity is being conducted in a manner that complies with the *ITA,* and if so to tax it. If a CRA auditor passes on information about a criminal activity that is not already subject to criminal investigation, the *ITA* makes the auditor subject to a fine or imprisonment.[11]

This policy of illegality not being CRA's business carries over to the regulation of charities. The *ITA* contains explicit provisions that authorize CRA to revoke a charity's registered status for wrongfully issuing official donation receipts, carrying on business activities, failing to meet disbursement quotas, and other "economic" criteria. The *ITA* does not explicitly authorize CRA to revoke a charity's registered status for carrying on illegal activities. The provision that comes the closest to granting such authority is s. 168(1)(b), which authorizes CRA to revoke registration when a registered charity "ceases to comply with requirements of this Act for its registration as such."[12] However, the *ITA* contains no requirement that charitable activities be legal.

C. TERRORIST PURPOSES IN CHARITY LAW – THE REDEMPTION OF CAPTIVES

This Commission is specifically concerned with terrorist activities and not just illegality. If Osama bin Laden were to ask whether OBL Charity could carry on terrorist activities, I would have to consider the fact that the law of charities explicitly authorizes activities that are contrary to Canada's anti-terrorism legislation. Just three weeks ago (October 5, 2007) the Supreme Court of Canada confirmed the continuing application of the *Preamble* to the *Statute of Elizabeth*, a 1601 statute that lists "the relief or redemption of prisoners or captives" as a charitable use.[13] When one considers the history of this activity, it seems impossible that it could have been carried out without directly or indirectly financing a terrorist cause. The Crusades left a legacy of piracy in which corsairs carried on a holy war against the enemies of their faith by capturing Christians at sea and selling them as slaves. These corsairs, who operated from Turkish regencies in northern Africa, attacking maritime traffic in the Mediterranean, saw themselves as warriors of Islam in ways that may parallel modern jihadis. Charities responded to these terrorist attacks by raising money to purchase the release of the captives taken by Muslim pirates.

This practice of paying ransom funds to terrorists in order to save the lives of Christians would clearly be in contravention of the "financing of terrorism"[14] provisions in the *Anti-terrorism Act*. From the perspective of the *Anti-terrorism Act,*[15] a charity that provided funding to terrorists for the relief of captives could be said to be intending that the funding be used in part for the purpose of facilitating the terrorist activity of holding such captives. However, it is clear that the law of charity has a long history of enabling activists to deal directly with terrorists and to collect funds knowing that, in whole or part, these funds will be used by or will benefit a terrorist group.

D. ISSUE OF THE IDENTITY OF DIRECTORS IN CHARITABLE REGISTRATION

If Osama bin Laden wants to be a director of OBL Charity, the application will undoubtedly be denied. Every person named as a director in the application for registered charity status must include his address and birthdate so that the identity of the director can be vetted by Canadian Security Intelligence Service (CSIS). Canada, the United Nations, the United States, and other countries all publish lists of "bad guys," and this Inquiry knows better than I do that Osama bin Laden's name is on each of those lists, spelled in as many ways as can be imagined. I am not aware of how many registrations of terrorist organizations have been averted by focusing on the names of directors.

However, I do know that the identity of the directors factors into the CRA's administrative decisions regarding charitable registration. This fact is resented by applicants for charitable registration who come from minority ethnic and religious communities. In the most recent charitable registration decision heard by the Federal Court of Appeal, the location of the home address of the directors and counsel was cited as a reason for rejecting what law should be applied in determining the meaning of charity.[16] I have some difficulty in explaining the relevance of the residence of a charity applicant's lawyer to the determination of the issue of whether the applicant is a charity. However, I know from experience that charity applicants from ethnic and visible minorities feel at a significant disadvantage when the name and address of the directors are a material consideration in the registration process. They worry that they are being "profiled" in a prejudicial way even if that is not what CRA is doing.

I recognize that there is a certain attraction in enacting a provision that would prevent Osama bin Laden from being a director of a charity. The problem would be to draft an appropriate provision that would apply prior to him having committed an act of terrorism. The courts are not well equipped to determine that someone is too religiously zealous to be a director of a religious charity. I have just come from China, where there is controversy because an atheist Communist government has passed a law making it illegal for Buddhists to be reincarnated. The intent is to address the political problem with the Dalai Lama by attacking the basis for his selection. However, it is a reminder of how difficult it is for secular governments to address problems which are rooted in religion.

I do think CRA has a difficult time in detecting any terrorist intent when dealing with registration applications and am sympathetic with how capricious the process is. At present, the frontline in the war on terrorist funding through charities is the Charities Directorate examiner, who scours the Statement of Activities and Budget provided by charity applicants to CRA. When one considers the extent to which applying for charitable registration has become an inane process of repeating formulaic charity code words rooted in a different age, different country, and different social and political environment, it seems that the Directorate's success will unfortunately depend more on luck than on skill.

The difficulty of identifying terrorists by processing paper came home to me as I reflected on a conversation I had in 2003 with the official from the Interior Ministry in Pakistan who was responsible for policing the religious groups in Pakistan. I was in Sri Lanka at a regional seminar organized by the British Foreign and Commonwealth Office to discuss the consequences of UN Security Council Resolution 1373 for NGO regulation. The Charity Commission of England and Wales was assisting governments with the creation of legislation to prevent charities from channeling funds to finance terrorism; I was the only non-government person there. The governments of Afghanistan, Pakistan, Sri Lanka, Bangladesh, Thailand, Malaysia, Indonesia, Singapore, and the Philippines were represented by senior diplomats and anti-terrorism officials. The official from the Pakistani ministry was an intimidating individual with a Taliban-style beard, and I cautiously asked him how he identified which charities were aligned with terrorists. His brusque and short response was that he looked at whose pictures they put up on the wall. I remember thinking how unsophisticated his response seemed at a seminar on sophisticated money-laundering techniques. However, as I have reflected

on that answer about the pictures on the wall, I have come to believe that we may learn more about terrorist finance by asking simple intuitive questions than by analyzing complex data that is so voluminous it can only be processed by computers. I also realized that his answer was one that only an official immersed in the religious culture would have the intuition to give.

Back in Canada, I have refused to provide legal advice about how to structure charitable activities to an individual who I worried might potentially be involved with terrorism. It was a difficult ethical problem, given the old law-school debate about whether a lawyer has an ethical obligation to represent a despicable character accused of murder. I felt obligated to articulate my reasons to the potential client and cited Section 83.19 of the anti-terrorism provisions, which states that someone may be guilty of facilitating a terrorist activity whether or not they know a particular terrorist activity is facilitated or any terrorist activity was actually carried out.[17] In the interest of full disclosure I should also reveal that I refused to provide legal advice on structuring a charity to assist William Sampson at a time when he was in a Saudi Arabian jail accused of terrorism. He was ultimately vindicated due to the tenacity of others who had greater legal courage than I did.

2. Registered Charities and Terrorism

A. CONDUCTING TERRORIST ACTIVITIES THROUGH A CHARITABLE ORGANIZATION

Let us assume that Osama bin Laden succeeds in having OBL Charity registered as a charitable organization. Let us also assume that OBL Charity wants to use some of its resources to build Improvised Explosive Devices (IEDs) in Pakistan. While building IEDs in Pakistan is not charitable, the current regulatory framework makes it very difficult for such an activity to be detected if it is carried on by the Canadian charity overseas. The *ITA* defines a charitable organization as one in which "all the resources…are devoted to charitable activities carried on by the organization itself."[18] The practical effect of this wording is that if a charitable organization wants to directly carry on terrorist activities overseas and CRA does not detect this in the registration process, the Interior Ministry in Pakistan will have a very hard time detecting OBL Charity's terrorist activities on the ground.

CRA's published guidance on the international activities of Canadian charities states that international activities can be carried out by joint venture, contracts or agency agreements.[19] If there is an agency agreement, the agreement must provide that the Canadian charity's funds and property will be segregated from those of the agent and that the agent will keep separate books and records. The charity laws of the United States and most countries allow and expect funding charities to make grants to recipient charities abroad. The result is that those grants find their way into the books and records of the recipient charity in foreign jurisdictions. Since the donated funds become part of the assets of the foreign charity, they are susceptible to an audit by the regulatory authorities in that country.

The Canadian requirement that funds spent on charitable activities in foreign jurisdictions remain under the control of the Canadian charity means that there is no basis to bring the expended funds into the books and records of the agent charity in the foreign jurisdiction. The requirement that the agent charity must segregate the Canadian funds

and keep separate books and records means that an audit by the regulatory authorities in the recipient country will not normally pick up the Canadian money. Consequently, if OBL Charity plans and executes its own terrorist activities carefully, it will be able to escape detection by the officials of the Interior Ministry in Pakistan who audit local charities.

B. THE CHARITIES REGISTRATION (SECURITY INFORMATION) ACT

The *ITA* definition of a charitable organization as an entity that carries on its own charitable activities also presents a challenge to issuing a certificate under the *Charities Registration (Security Information) Act*. The basis for the certificate is that a registered charity "has made, makes or will make available any resources, directly or indirectly, to an entity" that is a terrorist organization or engages in terrorist activities.[20] If OBL Charity is careful to carry on all the terrorist activities itself, then it has not made any resources available, directly or indirectly, to any other entity. It would appear that the drafters were so confident that a Canadian charity would not directly engage in terrorist activities that they did not unequivocally cover this possibility.

C. FUNDRAISING FOR TERRORIST ACTIVITIES THROUGH A CHARITABLE FOUNDATION

Osama bin Laden may also want to set up a charitable foundation to fundraise for terrorist activities. The *ITA* defines a charitable foundation as "a corporation or trust that is constituted and operated exclusively for charitable purposes."[21] The *ITA* defines "charitable purposes" to include the disbursement of funds to "qualified donees" and defines "qualified donee" to include registered charities.[22] Therefore, if Osama bin Laden wanted to set up a charitable foundation called the Osama bin Laden Foundation (OBL Foundation), whose objects were limited to raising donations, investing funds, and making gifts to other registered charities and qualified donees in Canada, I believe he could do so. I am not aware of any ground upon which CRA could refuse to register a foundation with that name and those objects, even if CRA believed that OBL Foundation was ultimately raising funds for terrorist activities.

The *ITA* does not impose any sense of "expenditure responsibility," as that term is used in charity tax law in the United States, on Canadian charitable foundations. If a Canadian foundation makes a gift to another registered charity, it fulfils the statutory requirement of operating for "charitable purposes," regardless of how those funds will ultimately be used by the recipient qualified donee. Therefore, as long as OBL Foundation issues its donation receipts properly, makes enough gifts to meet its disbursement quota, and makes its annual filings, there is no basis for CRA to seek revocation under subsection 149.1(3) or 168(1). As I have already stated, the broadest basis for revocation is s. 168(1)(b), which would apply if OBL Foundation "ceased to comply with the requirements of this Act for its registration as such."[23] While raising funds for terrorism may contravene the Criminal Code, it does not contravene the *ITA*. Subsection 168(3) was added to authorize the revocation of the registration of a registered charity immediately upon a certificate being issued pursuant to the *Charities Registration (Security Information) Act*. It is important to remember, however, that a *CRSIA* certificate must be "based on security or criminal intelligence reports," so CRA cannot rely on the certificate process to revoke registration under subsection 168(3) based upon information gathered in a CRA audit.

Listening to some of the earlier testimony provided to the Commission by CRA on the issue of why no security certificates have been issued to date, I formed the impression that this is because CRA has chosen to deny or revoke registration using the normal provisions in the *ITA*. In the interest of national security, I hope that CRA has considered that the entire Charities Directorate file must be disclosed to an organization if it initiates an appeal to the Federal Court of Appeal of a refusal to register or intention to revoke registration. This file forms the entire record upon which the Federal Court of Appeal must base its decision. The *ITA* contains no provision which would allow CRA to refuse to divulge this information on the basis that it is a threat to national security. Presumably, such a national security argument would fail since Parliament has provided an alternate statutory solution to dealing with information obtained from security or criminal intelligence reports. It would be devastating to CRA's credibility to arbitrarily refuse to disclose this part of the Charities Directorate's file.

D. ANONYMOUS CHARITABLE DONATIONS RECEIPTS

CRA has an administrative policy that makes it significantly easier for Canadians to make donations to OBL Foundation and escape detection. The *ITA* states that tax benefits for charitable donations will only be given if the donor files an official receipt containing "prescribed information."[24] The *ITA* Regulations require that each official receipt contain "the name and address of the donor including, in the case of an individual, his first name and initial."[25] However, in an Information Letter posted on its website, CRA cites those statutory provisions and then explains how to make an anonymous $100,000 donation to a charity. The solution is for the donor to put the money into a lawyer's trust account, to instruct the law firm to make the gift, and then to have the charity issue the official receipt to "Benefic Lawyers in trust."[26]

This is a technique which I used frequently prior to 9/11. My experience, consistent with the assumption made by CRA in its letter, is that a recipient charity will readily issue a receipt in contravention of the Regulations. I can only remember one occasion when a charity demanded to be provided with CRA's letter authorizing this technique, and donors seldom filed the Information Letter with their tax returns. Now that many tax returns are filed electronically, not even the receipt itself is filed initially, let alone the explanatory letter. CRA can and frequently does ask a taxpayer to verify the donation claim by producing the official receipt if there is a significant change in the donor's giving pattern or profile. I have not been involved with anonymous giving through lawyers' trust accounts since 9/11 so do not know whether CRA demands to see correspondence to back up the receipt. Because CRA knows the identity of the taxpayer whose return it is auditing at the time of any such demand, there is no reason for the donor to refuse to produce any correspondence linking the gift from the donor taxpayer to the funds donated through the lawyer's trust fund. However, particularly if the donor provides the requested correspondence to CRA without fuss, there is no reason to expect that the agency would suspect any problem or close the circle of information linking the donor taxpayer to the OBL Foundation. The CRA assessing officer would have to do something beyond his task of routinely confirming that an official receipt is available to justify the claim for the donation tax credit.

The significance of the anonymous receipts policy is that CRA may not be able to determine the identity of a donor that has provided funds to OBL Foundation when it audits

the foundation. If CRA demanded that I as a lawyer disclose the identity of a donor who provided funds to Benefic Lawyers in trust, I could refuse on the basis of solicitor-client privilege. It might be argued, if I had full knowledge of the CRA Information Letter, that I had facilitated terrorist fundraising by suggesting an anonymous receipt and by not disclosing the documentation to CRA. However, typically it will be the donor who drives the transaction by simply asking the lawyer to send a trust cheque to the charity. Unless the lawyer is familiar with the *Income Tax Act Regulations* on gifts receipts, the lawyer will normally assume that the donor is simply very modest or wants to remain anonymous to avoid future solicitations. However, this practice, which is not even in compliance with the *ITA*, completely frustrates the intent of the initiatives to block terrorist funding through charities. It seems inappropriate to give CRA the inordinate powers legislated by the *ATA* when it is not even responsibly requiring compliance with the *ITA*.

3. Alternatives to Incorporating and Operating a Charitable Organization

A. NONPROFIT ORGANIZATIONS

In my opinion, the collective discussion on how Canada's legal framework might facilitate terrorist financing has put too much emphasis on the favoured tax position of registered charities and not enough emphasis on the position of nonprofit organizations (NPO). An NPO is defined in the *ITA* as a:

> society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit…[27]

An NPO is not entitled to issue tax receipts for donations but is exempt from taxation on its income. Because it does not have the privilege of issuing official donation receipts, an NPO receives much less regulatory scrutiny from CRA. Also, there is nothing in the tax status of an NPO which prevents it from making grants to any non-proprietary public benefit organization overseas. An NPO is not required to carry on its activities itself, or to restrict its donations to qualified donees.

When Charities Directorate sends its first Administrative Fairness Letter (AFL) to an applicant for charitable registration which CRA does not expect to qualify, it invariably advises the applicant that it will likely qualify as a NPO. This is reasonable because "in the opinion of the Minister," the applicant is not a charity. The irony of this is that most people assume that NPO is simply another word for a charity. If OBL Charity was denied registered charity status, Osama bin Laden could honestly tell prospective donors that he had applied to Charities Directorate and been designated a NPO. If the donor was skeptical, bin Laden could bolster his claim to legitimacy by pointing to the Business Number issued to OBL NPO by CRA. The Business Number would not be one issued by Charities Directorate and would not have a special suffix; but would be legitimately issued to OBL NPO by CRA. His representations would therefore technically be accurate. However, Osama would essentially have tricked the donor into donating by transforming CRA's issuance of an official number into an endorsement by CRA of the organization's nonprofit status without disclosing that CRA denied the organization registered charity status.

The fact that the *ATA* fundraising provisions focus only on registered charities also illustrates the lack of understanding among policymakers [or policy-makers?] and others in the sector about the nature of religious giving. It is clear to me that the drafters of the anti-terrorism legislation did not understand or did not consider the crucial difference between a donor who gives because he supports the opera or has a sense of civic duty, and a religious donor who gives because it is a theological obligation. My father was a Christian missionary whose income through his entire life was seldom, if ever, above the official poverty line. However, there was never a time when he failed to give his tithe to God on the meagre amount that he received. Even today, if I want to give him $100 to buy a pair of shoes, I have to give him $110 and hope the shoes are on sale for $99 or he will not be able to buy them with only my money. His giving is carried out as part of his duty to God and is not impacted by tax considerations. He does seek my legal advice as to whether an organization is a registered charity or a NPO before giving. He is not limited to giving to incorporated organizations. In fulfilling his duty to tithe he also gives to needy and itinerant individual religious workers who have no status with CRA. Religious charities are the single largest category of registered charities and yet the *ATA* demonstrates no understanding of the subjective differences in the motivations and *modus operandi* of religious donors.

Other religions have similar doctrines mandating both obligatory and voluntary giving. Muslims have the obligatory *zakat* and the voluntary *sadaqa*. Sikhs have the obligatory *dasvandh*, which is 10% of income, like the Christian tithe. The Sikh religion also has the *kar bheta*, which is a voluntary offering. However, there are significant differences between the methodology of giving in Christian churches and Sikh gurdwaras. Christians generally give weekly, using envelopes that identify the donor so that an official donation receipt can be issued for the cumulative donations at the end of the year and tax benefits claimed by the donor.[28] Sikhs generally give anonymously, by placing their offerings in a large locked box so that no one knows how much is given and by whom. Tax receipts are not generally issued, because many worshippers are recent immigrants who are not used to receiving tax benefits for religious donations. However, if a gurdwara receives most of its donations from donors who are not claiming tax benefits, then the gurdwara suffers no disadvantage from being an NPO rather than a charitable organization. In fact, given the problems that gurdwaras face in obtaining charitable status if they carry on cultural and language programs, we advise some of these organizations that it would be a waste of money to apply for registered charity status.

The significance of this methodology of giving is that the recently enacted anti-terrorism provisions in Bill C-33 are all avoided if the gurdwara is a NPO that has never applied to become a registered charity. If the gurdwara has applied for registered charity status then it is caught by some of the new provisions. Subsequent to the provisions of Bill C-33 being proclaimed in force on February 10, 2007, the Supreme Court of Canada has reiterated that "it is imperative to preserve the distinction that the *ITA* makes between charitable and nonprofit organizations."[29] This means that significance must be given to Parliament's decision to not include NPOs in these anti-terrorism provisions.

B. FOR-PROFIT ENTITIES

In its most recent decision on the registered charity provisions, the Supreme Court of Canada placed great emphasis on the role of the "scheme of the *ITA*." [30] However, the

ITA scheme on NPOs and charities produces a very anomalous result, which has some potentially disturbing results when considered from the perspective of charities financing terrorism. The *ITA* defines a nonprofit organization as a society that "in the opinion of the Minister" is not "a charity within the meaning assigned by subsection 149.1(1)."[31] While the Minister's opinion is only formally revealed when an organization applies to Charities Directorate for registered status, the Minister's opinion must be informed by the common law. What this means, essentially, is that an entity whose purposes are exclusively charitable but does not seek registration is not a nonprofit organization. Rather, an unregistered charity is a taxable entity like any other corporation.

Consider the consequences if my client Osama bin Laden told me that he believed CRA had been prejudiced against Muslims since 9/11, and that he did not believe that he had a fair chance of being registered. As a result, he was prepared to forego the tax benefits of being a registered charity and simply wanted me to create an incorporated entity that would enable him to carry on charitable activities in the fields of religion, education, and relief of poverty. Based upon my discussions with many Muslims since 9/11, there is a widely held belief that CRA has such a bias. Consequently, this assertion in itself would be no basis for me to suspect that bin Laden was a terrorist. My personal experience in assisting Muslims seeking charitable registration since 9/11 would not provide me with grounds to convince him that he was wrong. Therefore, I would advise bin Laden to instruct me to prepare exactly the same Letters Patent and Bylaws he would have used for his charitable organization, but not to apply for registered charity status.

The result of this advice would be a federally incorporated, non-share capital corporation which I will call OBLCo. OBLCo looks like a duck, quacks like a duck, and waddles like a duck, but is definitely not a duck. OBLCo is a for-profit corporation that has no shareholders. It does not have the ability to issue official donation receipts. However, that might be an asset, rather than a liability, to a religious community that, since 9/11, has been hesitant to give to Islamic registered charities for fear of attracting attention from the government. I also have Christian worship organizations as clients that have consciously refused to become registered charities because the freedom from the interference of CRA means more to them than the tax benefits. I have previously outlined why such a structure would not be disadvantageous to any religious institution whose worshippers place anonymous donations in a collection box. It would also not be disadvantageous to Christians placing cash offerings in the collection plate. The obligation of their adherents to tithe would not be reduced by the absence of tax benefits.

The instinctive reaction to OBLCo is that it is not tax efficient to run a charity through a taxable corporation. Certainly the *ITA* definition of "business" is broad enough that it would include religious endeavours and even terrorism,[32] so that any donations to OBLCo would be taxable income. However, if donations to OBLCo for religious and terrorist activities are "income," outlays and expenses incurred in carrying on religious activities and terrorism are deductible as being for the purpose of gaining or producing donation income.[33]

The real significance of operating OBLCo as a for-profit corporation relates to the audit and anti-terrorism provisions. CRA has extremely wide audit powers, but only as long as the audit is for a purpose "related to the administration or enforcement of this Act."[34]

CRA can audit a registered charity to determine whether it has "ceased to comply with the requirements of this Act for registration as such"[35] and therefore can examine its activities in light of its purposes. However, CRA can only audit OBLCo for the purpose of determining whether it is declaring all of its donation income and whether the deductions which it is claiming are legitimate.

Operating OBLCo as a for-profit corporation would also frustrate the new intelligence- and information-sharing provisions in Bill C-33. Since February 10, 2007, CRA can provide "designated taxpayer information" to CSIS, the RCMP, and Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) if it believes the information is relevant to terrorism or national security. However, "designated taxpayer information" only includes taxpayer information "of a registered charity, or of a person who has at any time made an application for registration as a registered charity."[36] Consequently, Bill C-33 would not apply to OBLCo or OBL NPO if neither entity had ever applied for registered charity status.

As I have previously said, the *ITA* is not concerned with the legality of a taxpayer's activities unless those activities limit the collection of revenues. Consequently, CRA is a particularly inappropriate regulator if the objective is to detect and stop money flowing to fund terrorism. Before allowing CRA officials to give evidence to this Inquiry, their lawyer cited the taxpayer confidentiality provisions in the *ITA*, which limited the information that could be provided.[37] A regulator other than CRA might be given different confidentiality constraints tailored to the particular problems of terrorist financing.

This Commission's mandate of making recommendations as to whether Canada's existing legal framework provides adequate constraints on terrorist financing is focused on registered charities. However, the Commission should recognize that as funding for terrorism becomes more sophisticated, there will be a concerted effort to move away from the use of registered charities, which receive the highest level of scrutiny at this time. Terrorists will find it far more comfortable to use commercial vehicles for raising funds. There is considerable opportunity for them to finance terrorism through commercial activities like selling fake goods. Consideration needs to be given to providing a mechanism to alert the appropriate authorities about such suspicions as long as safeguards can be crafted that prevent reported information from being used for other purposes.

III. HEARTS AND MINDS: THE RELATIONSHIP BETWEEN CRA AND CANADIAN CHARITIES

1. The Link between the Regulator-Regulatee Relationship and Terrorist Financing

I have begun my presentation by describing the ways in which Canada's existing legal framework fails to place adequate constraints on the misuse of funds for terrorist financing. I want to end by proposing solutions, or at least some potential ways forward. However, I must first make some comments on the relationship between Canadian charities and Canada's charity regulator, a relationship which in my view will impact any effort to address the misuse of charitable funds for terrorist financing, and which will affect how much success the Canadian state has in winning the battle for hearts and minds that is coming to be recognized as the key to the war on terror.

I have written at great length in other contexts[38] about the crucial role that charities play in the battle for hearts and minds in communities that are vulnerable to poverty, marginalization, and ultimately terrorist activity. My friend Kenneth Dibble alluded to the significant role of charities in his testimony as well. However, just as charities play an important role in ensuring that communities do not become alienated from, and angry with, the rest of society, regulators of charities have a role to play in ensuring that charities do not become alienated from, and angry with, the state. Among other things, this requires that the regulator of charities act in a fair, open, and consistent manner.

This is admittedly a difficult task, and I do not want to be seen as impugning the integrity of any individual within the Charities Directorate of the CRA. However, I do believe there are several systemic problems with the current administrative system, which are doing damage to the relationship between CRA and Canadian charities, particularly charities that represent specific ethnic and religious groups. The weakening of this relationship is disturbing in itself, but it is much more disturbing and relevant to this Commission in light of the numerous methods of directing funds to terrorist financing and circumventing the registered charity scheme that I have described above. It is perhaps most relevant to this Inquiry's mandate to make recommendations that might "prevent the recurrence of…deficiencies in the assessment of terrorist threats in the future."

2. The Effect of CRA's Administrative Discretion on its Relationship with Canadian Charities

As this Commission has likely gathered by now, the statutory framework governing registered charities in Canada provides relatively little guidance to the Charities Directorate in its work. The Directorate is supposed to register organizations with "charitable purposes" and "charitable activities," terms the Canadian courts have always interpreted by reference to the common law.[39] However, there have only been about 35 judicial appeals of charitable registration decisions since the system began, almost all of them unsuccessful. England now has a statutory definition of charity,[40] so future English decisions on charity will be interpreting an English statute and will have a much reduced jurisprudential value in Canada. Further, the Supreme Court of Canada has recently stated that provincial charity law decisions are not relevant to the interpretation of the *Income Tax Act,* at least if they occurred under a statute such as the Ontario *Charities Accounting Act.* This will have consequences, not only because it reduces the number of Canadian cases available to define the meaning of charity in the federal context, but because the concept of charity can arguably be best developed within contexts that are not fiscally driven, and not complicated by the rules of administrative law. The result of all this is that the Charities Directorate exercises an unparalleled amount of discretion in determining whether organizations are charitable at law, basing its decision on a limited number of English and Federal Court of Appeal cases, many of which arose in social contexts very different from the present day.

The problem is that, at least from the perspective of certain ethnic and religious communities, CRA selectively chooses which common law rules it will apply and which it will not. This is best illustrated by analyzing its policies with regard to the registration of religious organizations, which constitute the largest single category of registered charities in Canada.

It is an elementary tenet of the common law definition of religion that polytheistic religions are excluded. There is no charity law case in Canada or England that admits polytheistic religions to the advancement of religion category. In 2006, the English Parliament enacted a new statutory definition of charity, which includes "a religion which involves belief in more than one god."[41] Canada has never passed such a definition to supersede the common law.[42] However, as this Inquiry is focused on the Indo-Canadian community, we all know that CRA routinely registers polytheistic Hindu and Sikh religious groups as charitable organizations.

CRA's decision to ignore the common law rule on polytheism preceded the introduction of the *Canadian Charter of Rights and Freedoms,* but today its decision is prudent in that the rule may well be contrary to the freedom of religion and equality guarantees in the *Charter*. Instinctively, it seems clear that it would be discriminatory for an agent of the state to register Christian charities because they are monotheistic, and to reject the applications of Sikh charities because they are polytheistic. One of the challenges in understanding the law of charity is that there appears to be no intellectual consistency as to what "law" is applied to applicants for charitable registration. As a practical matter it is much less confusing to simply ignore the law and base one's application for charitable registration on CRA's administrative policies.

While CRA ignores the common law rules touching on theological issues such as polytheism and polygamy to the advantage of religious communities such as Hindus and Sikhs, it vigorously applies an old English case to deny registration to Hindu and Sikh temples and Islamic mosques on non-theological grounds. *Williams' Trustees*[43] is a 1947 decision of the English House of Lords, which limits the fourth head of charity in a way I consider to be fundamentally hostile to immigrant communities and multiculturalism. The House of Lords held that maintaining a meeting place in London to promote the study of Welsh language, history, and culture was not beneficial to the community "in a way which the law regards as charitable."

In my experience, most temples and mosques want to provide language programs and the other activities described in *Williams' Trustees* in addition to their religious programs. This aspiration seems entirely consistent with the *Charter,* which says that freedom of religion "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[44] However, CRA's policy on "assisting ethnocultural communities" states that neither the promotion of a particular culture nor the promotion of multiculturalism is charitable.[45] As such, immigrants seeking to include the preservation and enhancement of language and culture as a purpose and program of their temple or mosque will have their registration denied.

It may seem that this point about the application of the common-law rules on religion is irrelevant to this Inquiry and the issue of terrorist financing. I believe that it is actually extremely relevant in three ways.

First, it illustrates how the sector has veered away from a consistent application of the rule of law, and towards administrative policies that benefit some, but not all, ethnic and religious groups. Second, it illustrates how some of the common-law rules that we continue to rely on are inconsistent not only with our social policies, but with the values

of the *Charter*, our "fundamental law." Finally, I believe my comments on the application of the common law rules on religion shed some light on how easy it is for charities, and particularly ethnic and religious charities, to become alienated and cynical about CRA and the whole system of charitable registration.

Ethnic communities in Canada often begin their interaction with Charities Directorate with a hardline application of legal principles they believe are discriminatory and unfair, because they do not affect non-immigrant churches. If they make no changes in their aspirations and programs they will be denied registration and operate without the tax benefits provided to registered charities. Alternately, they can abandon their cultural preservation programs and obtain charitable registration for restricted activities. However, the most common response is to obtain advice on how to craft their responses to the Directorate so as to succeed in obtaining registration by characterizing the cultural programs with appropriate charity-law code words involving education. The problem that is relevant to this Inquiry is that once these temples and mosques learn that Charities Directorate is programmed to respond favourably to common-law code words and formulaic descriptions of activities, they will know that the same techniques will enable them to describe their international charitable activities in ways that will avoid future problems with CRA's auditors.

3. The Effect of CRA's Revenue Collection Mandate on its Relationship with Canadian Charities

A. CONCERN FOR THE FISC

CRA also has difficulty building strong relationships with charities because it is a tax collection agency, which understands that in regulating the charitable sector its "mandate is to protect the tax base."[46] This mandate means that CRA's interaction with charities is not primarily oriented towards assisting the development of the charitable sector or mentoring best practices. Although the Charities Directorate may aspire to serve the charitable sector, its statutory function and mandate will always trump its aspirations. This has real-life implications. At common law, where it is uncertain whether a transaction is a gift, there is a legal presumption in favour of finding a good gift. However, in 25 years of practice, I have never known CRA to go to court to argue in favour of this presumption. Unfortunately, my experience is that CRA often responds to charitable donations as if it had no appreciation that the donor is giving more than he or she is getting in tax benefits, and that the *ITA* encourages and provides incentives for such donations. In all of the cases of which I am aware, CRA has sought to protect the national treasury at the expense of charity. Contrast this with the statutory imperative of the UK Charity Commission that "so far as is reasonably practicable the Commission must, in performing its functions, act in a way which is compatible with the encouragement of all forms of charitable giving."[47]

Consider the case of *Jabs Construction Ltd. v. Canada.*[48] The taxpayer had given $10 million to the charity in a complicated series of real estate transactions.[49] The value of the real estate and the benefit to the recipient charity were not questioned. The planning was technically correct, so CRA invoked the discretionary general anti-avoidance rule (GAAR) in s. 245 of the *ITA* to impugn the tax planning. CRA wanted to disallow

the gift and impose tax on the $10 million of property that had been transferred to the charity. It was accepted by all parties that a CRA victory would result in the donor being entitled to have the $10 million returned. CRA chose to sue for the tax even though success would mean $10 million being removed from the charitable sector. Fortunately, the court held in favour of the taxpayer and the donation tax benefit stood as well as the gift to the charity.

CRA's desire to protect the national treasury shows up in registration appeals as well as in cases involving gifts to charities. In the recent *A.Y.S.A.* decision, for example, CRA argued that the promotion of amateur sport should not be charitable because certain sports involve considerable danger, resulting in possible injuries to participants which would "ultimately be underwritten by Canadian taxpayers."[50] These types of arguments are perhaps natural in an adversarial court proceeding. However, it is difficult for charities to have any faith that CRA has their interests, or even the public interest, in mind when its positions seem entirely aimed at preventing any additional cost to the fisc.

CRA's focus on revenue collection has an even more insidious effect on its role in revoking the registration of established charities. Pursuant to the provisions of Part V of the *ITA*, if CRA revokes a charity's registration or a security certificate is issued under *CRSIA,* a penalty tax is imposed upon all undistributed assets of that charity after a certain period of time. Consequently, the state has an economic interest in revoking registration or issuing security certificates.

The contrast I want to draw is with the evidence given by Mr. Dibble: in England the response to an abuse of charity funds is to change the trustees and preserve the assets for charity. This response is dictated by England's system being dominated by trust law and the consequences of the application of the doctrine of resulting trust if the trust fails. Much more importantly, the Charity Commission's response reflects a trust law view that if a charity engages in terrorist activities, this is not a failure of the trust but a failure of the trustees to exercise their duties lawfully. In similar circumstances, CRA effectively does nothing about the trustees and simply expropriates the assets, to the detriment of the charitable sector and the benefit of the fisc. I realize that delving into the practical consequences of making the fundamental nature of charitable registration a matter of trust law rather than tax law may go beyond the scope of this Commission, but my intention is simply to highlight differences which might not be immediately obvious from the testimony given so far.

B. NO VOICE FOR CHARITY

It is also significant that under the current system, no federal actor will speak for the interests of a particular registered charity or charity in general once CRA has decided to impugn a charitable gift. Even if Charities Directorate has a more charitable attitude towards whether a disposition is a "gift" than CRA's audit division, the Directorate is powerless to take a position in favour of upholding a gift once audit proceedings are in motion. CRA's Charities Directorate and its auditors are ultimately the same legal person. Nor can Charities Directorate speak for the interests of charity in general once a registration application or gift has been appealed because the government of Canada can speak with only one voice.

I learned the hard way that Charities Directorate will do nothing to assist charities in their hour of greatest need in the *Jabs* case mentioned earlier. I was not acting as a lawyer in the litigation but had acted for both the taxpayer and the charity in planning the gift. In my naive belief that Charities Directorate might intervene to support the gift, I set up a meeting on behalf of the recipient charity to discuss the matter with the Director General of Charities Directorate. As soon as the lawyer at Justice handling the litigation heard of the meeting, he wrote a letter threatening to report me to the Law Society for professional misconduct, for talking to his client directly instead of having the lawyer handling the litigation for the donor talk to the lawyer from Justice. That rather unnerving experience taught me that the Department of Justice does not see any difference in the legal role of Charities Directorate and Audit, nor in a lawyer speaking on behalf of the charity rather than the donor. I certainly learned that Charities Directorate loses all ability to intervene on behalf of a recipient charity once CRA targets a donor. This example illustrates one of the structural problems in having CRA act as the regulator.

The charitable sector has had legitimate grounds to doubt the motives of the government in its regulation of charities ever since government invented the doctrine of superstitious uses to expropriate the immense wealth of the chantry endowments and monasteries in Tudor England. In today's world, the government directs the priorities and wealth of the charitable sector through targeted fiscal incentives rather than through expropriation. However, if the *ATA* definition of carrying on, financing, participating, facilitating, instructing, and harbouring terrorist activities were given unqualified legal effect in Canada today, and the registration of all relief, development, educational, and religious charities whose activities could fall afoul of those provisions was revoked, the transfer of assets from the charitable sector to the state would be greater than in Tudor England. If the comfort that the charitable sector as a whole has taken in the belief that the anti-terrorism provisions will only be applied selectively is well founded, then ethnic and minority religious charities have cause to be concerned that they indeed are being targeted.

It is also important to remember that in the financing of terrorist activities it is frequently the government that is the most egregious offender. I will not detail the history of which governments armed and trained the insurgent and formal militants of the Taliban in Afghanistan and Saddam Hussein in Iraq. It is sufficient to consider the flow of charitable funds into the Tamil Tiger territory of Sri Lanka after the tsunami. The Canadian government provided additional tax incentives to donors to Canadian charities for this cause and provided federal money through CIDA. There was a wholesale suspension of anti-terrorist considerations, which was necessary to get the needed assistance to northern Sri Lanka. How is a regulator, which is the arm of a government that arbitrarily ignored anti-terrorism provisions in Sri Lanka, to insist on enforcing those provisions in Khalistan or Pakistan? Once the federal government has implemented its funding policies in Palestine or Israel, how is a regulator who is an agent of the federal government to take a different position with regard to the policies it imposes on registered charities?

4. Administrative Fairness and the Relationship between CRA and Canadian Charities

Unfortunately, I believe that CRA's relationship with the charitable sector is also being eroded by its failure to ensure that it acts fairly and consistently in its registration and au-

dit functions. Among organizations that apply for charitable registration, my experience is that the Charities Directorate often throws up procedural hurdles and technical barriers to registration, causing undue delay and expense to charities that are not informed until much later of the real issues and case they have to meet. From this perspective, I was somewhat concerned by the Directorate's testimony to this Inquiry that CRA has not invoked *CRSIA* because it has found ways to deny or revoke registration using the regular provisions of the *ITA*. I appreciate CRA's hesitation to rely on a certificates procedure whose transparency and fairness has been challenged. However, if CRA is rejecting applications on the basis of the technical wording of objects clauses when its real concern is terrorism, this seems no less unfair. Based upon the increased difficulties and delays in obtaining charitable registrations in recent years, I fear that rather than using the certificate process there has been an administrative decision to frustrate registration of suspect applicants by asking unending and unanswerable questions about objects and activities.

In recent years it has become almost impossible to obtain registration without rewriting objects clauses to exclusively use the formulaic code words set out in *Pemsel*. Even worse from the perspective of the broader charitable sector, this administrative procedure is being extended to applications of "ordinary" charities under the guise of administrative fairness, so that suspect charities cannot allege that they are being singled out for special attention. We have applications that have been in Charities Directorate for over two years. It is difficult to determine the extent to which Charities Directorate's increasingly narrow interpretation of what is charitable is an extension of its anti-terrorist concerns rather than just a manifestation of its desire to protect the fisc by registering fewer charities.

CRA officials have also testified before this Commission that the Charities Directorate staff search Internet and media sources to find possible evidence of offensive behaviour or links to radical activists.[51] CRA then writes Administrative Fairness Letters to applicants requiring them to convince Charities Directorate that none of the damaging allegations that CRA has imported into the file should bar them from registration. It is important that this Inquiry consider both the need for Charities Directorate to conduct due diligence to prevent inappropriate registrations and the impact that its conduct is having on religious and ethnic groups that feel they are being "profiled." Parliament has mandated a specific security certificate process that involves intelligence agencies and protects intelligence sources used in the process. According to the evidence provided to this Inquiry, CRA has chosen to forego this process in favour of its own internet and media searches. This Inquiry needs to make recommendations as to whether it is proper for CRA to assign anti-terrorism responsibilities which Parliament gave to intelligence agencies to registration examiners in Charities Directorate.

The collateral result of this process is that if an applicant does answer damaging allegations to the satisfaction of CRA and succeeds in becoming registered, CRA's "transparency" makes the registration a poisoned chalice. The reason is that once the applicant becomes a registered charity, all of the information in the registration file becomes available to the public.[52] It is hard to convey to this Inquiry the angry reaction I witnessed when I explained this provision to a Sikh client who had spent years diligently answering allegations based solely on media reports. There was little doubt that the media sources that had previously impugned the temple's reputation would seek the file from CRA after registration, and that scurrilous information would be dredged up by future members

and directors for political use. The only way to avoid this result was to voluntarily withdraw the application, with the result that while the information in the file was available to CSIS, it was not available to the public.

The argument made by CRA in defense of its policy is that it is more transparent than the security certificate process. However, if the certificate process mandated by Parliament had been used, the registration decision would at least have been based on "intelligence" rather than speculative and inflammatory press reports written to sell newspapers and would not have been available to the public. If this Inquiry comes to the determination that transparency is needed to avoid charity involvement in terrorist activities, it must propose a regulator and process that is less destructive in its transparency.

I have other clients who have wrapped up their charities because they have taken personal offence to the attitudes and bullying of CRA auditors. Most of them now run NPOs that are not subject to significant regulatory oversight and some of them in hindsight refer to their hostile audit experience as a "blessing in disguise." When considering the increased use of NPOs, this Commission needs to recognize that this trend is substantially due to the experience that charities have with the registration process and audit, and that increasing numbers of organizations are being excluded from the *ATA* provisions.

Editor's Note
This concludes Parts 1, 2, and 3. Part 4 will be featured in the next issue of *The Philanthropist*.

NOTES

1 Blake Bromley is the witness appearing in front of the Commission but I want to acknowledge the extensive contributions of my colleague at Benefic Lawyers, Kathryn Chan, J.D., LL.M., to the writing of this paper and to the conceptual analysis and solutions proposed.

2 *Commissioners for Special Purposes of the Income Tax v. Pemsel,* [1891] A.C. 531 at p. 583. The Pemsel classification was recently reaffirmed by the Supreme Court of Canada in A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency, 2007 SCC 42.

3 *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10.

4 *Everywoman's Health Centre Society v. MNR* [1992] 2 F.C. 52 (C.A.) at para *14*. This principle was seemingly applied in *Earth Fund,* where the court held that CRA should not register an applicant until it was "satisfied that the proposed operations of the appellant do not breach the gaming provisions of the Criminal Code.": *Earth Fund v. Canada (MNR)* [2002] FCA 498 at para *17.*

5 *Criminal Code of Canada,* section 293.

6 Historically, charity endowments and trusts providing funds for saying masses for the dead were prohibited on the basis that these were for an illegal "superstitious use." This legal doctrine originated in sixteenth-century Tudor England as an overt form of discrimination against Roman Catholics in favour of Protestants. I believe that Charities Directorate registers charities that have a purpose of saying masses for the dead; but I am aware of no jurisprudence that has overruled or disavowed the historic common law that this is an illegal purpose.

7 The theory is that trustees of charitable trusts cannot be remunerated because of trust law while directors of charitable corporations face no such restriction.

8 There is support for this line of thinking, but not conclusive agreement, in the Supreme Court of Canada's statement in Vancouver Society at para 28: "Because the law of charity had its origin in the law of trusts, many of the leading authorities in this area arose in the context of determining the essential validity of a putative charitable trust".

9 The significance of this is that the definition of a charitable organization contains the words "all the resources of which are devoted to charitable activities carried on by the organization itself," which implicates the charitable organization in its supporters' activities. Further, these illegal activities are often part of the fundraising strategy of the charity seeking new donors from the publicity.

10 *A.Y.S.A., supra* note 2 at para *39*.

11 *ITA* s. 239(2.21).

12 *ITA* s. 168(1)(b).

13 *A.Y.S.A., supra* note 2 at para *25*, citing the *Preamble* to the *Charitable Uses Act, 1601* (Eng.), 43 Eliz. 1, c. 4 (*Statute of Elizabeth* or *Statute of Charitable Uses*).

14 *Criminal Code, supra* note 6, s. 83.02–83.04.

15 *Criminal Code, supra* note 6, s. 83.03: Everyone who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services
(*a*) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
(*b*) knowing that, in whole or part, they will be used by or will benefit a terrorist group, is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

16 *Travel Just v. CRA*, 2006 FCA 343 at para *13*.

17 *Criminal Code, supra* note 6, s. 83.19 provides: "(1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. (2) For the purposes of this Part, a terrorist

activity is facilitated whether or not…(a) the facilitator knows that a particular terrorist activity is facilitated; (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or (c) any terrorist activity was actually carried out."

18 *ITA* s. 149.1(1)

19 CRA Publication *RC4106(E): Registered Charities: Operating Outside Canada,* available online at http://www.cra-arc.gc.ca/E/pub/tg/rc4106/rc4106-e.html

20 *CRSIA*. Section 4(1) reads: "The Minister and the Minister of National Revenue may sign a certificate stating that it is their opinion, based on security or criminal intelligence reports, 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."

21 *ITA* s. 149.1(1).

22 *ITA* s. 149.1(1).

23 *ITA* s. 168(1)(b).

24 *ITA* s. 110.1(2) and s. 118.1(2).

25 *ITA Regulations,* s. 3501(1)(g).

26 See CRA Information Letter CIL-1994-006 at http://www.cra-arc.gc.ca/tax/charities/policy/cil/1994/cil-006-e.html

27 *ITA* s. 149(1)(l).

28 However, there are Christians who refuse to file their official donation receipts on the basis that the tithe is an obligation to God that should not be offset by a refund from the government. There are also other religious communities that require that a certain portion of the obligatory religious giving not go to a registered charity, with a result that no official donation receipts are issued and claimed by the donor.

29 *A.Y.S.A.*, *supra* note 2 at para *29*.

30 *A.Y.S.A., supra* note 2 at para *31*.

31 *ITA* s. 149(1)(l).

32 See *ITA* s. 248(1), defining a "business" as including "a profession, calling, trade, manufacture or undertaking of any kind whatever."

33 *ITA* s. 18(1)(a).

34 *ITA* s. 231.1(1).

35 *ITA* s. 168(1)(b).

36 *ITA* s. 241(10).

37 Submission by Mr. Roger Leclaire to Air India Inquiry on October 3, 2007.

38 See Blake Bromley, "Winning the Battle for Hearts and Minds: The Role of Charities in the War on Terrorism". This paper grew out of a number of seminars and oral presentations at international conferences and is available on the Benefic Group website: http://www.beneficgroup.com

39 *A.Y.S.A., supra* note 2 at para *24*.

40 *Charities Act 2006 (U.K.)*, 2006, c. 50.

41 *Charities Act 2006 (U.K.*), 2006, c. 50, s. 2(3)(a)(i).

42 It is doubtful that adopting polytheism would be "incremental change" within the power of the courts but is "substantial change in the definition of charity [which] must come from the legislature rather than the courts". [Meaning unclear; highlighted phrases do not work grammatically.] See *A.Y.S.A.* para *44*. Presumably, extending registered-charity status to polytheistic religions has a significant impact on the national fisc.

43 *Williams' Trustees v. IRC* [1947] AC 447 (HL).

44 *Charter of Rights and Freedoms*, s. 27.

45 CRA Policy CPS-023, "Applicants Assisting Ethnocultural Communities", available online at: http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-023-e.html.

46 Testimony of Mr. De March to Air India Inquiry on October 3, 2007.

47 *Charities Act 2006 (U.K.*), 2006, c. 50, s. 7.

48 [1999] 3 C.T.C. 2556, 99 D.T.C. 729 (T.C.C.).

49 In the interest of full disclosure, I point out that I had planned this gift for the donor.

50 *AYSA v. CRA*, 2006 FCA 136 (Factum of the Respondent at para *49*).

51 Testimony of Mr. De March and Mrs. Walsh to Air India Inquiry on October 3, 2007.

52 Testimony of Mr. De March to Air India Inquiry on October 3, 2007.