FUNDING TERRORISM AND CHARITIES (PART 4)

Blake Bromley

Summary

The following is the conclusion of an article 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. The first three parts of this article were published in the last issue of *The Philanthropist*, *23*(4). The conclusion, Part IV, "Ways Forward" is the final installment of the article, which will be followed by a third installment – 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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IV. Ways Forward

1. The Need to Change the Status Quo

As I reflect upon my evidence to this Inquiry, I worry that I have done more to draw a roadmap for those who are interested in clever ways of funding terrorism than 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." I also realize that I have been critical of the common law of charity and the role of CRA. While I know that CRA and most of the charitable sector establishment would prefer maintaining the current system with only "incremental" change, I am convinced that we need a more radical departure from the *status quo*.

Let me begin by saying that I believe there is a potential problem with charities funding terrorism that needs to be brought out in the open and discussed with the communities that are most vulnerable. It troubles me that the federal government has been reluctant to recognize and confront this problem. In November 2000, the Government of Canada launched the Voluntary Sector Initiative (VSI), which spent $94.6 million to create a closer working relationship between the federal government and the voluntary sector. VSI issued its final report in 2003 and paid no attention whatsoever to the issues of terrorism and terrorist funding by charities. This is quite astounding in my view, since prior to the beginning of VSI, it was generally assumed that registered charities had played a role directly or indirectly in the Air India tragedy. The 9/11 tragedy happened during the course of VSI and the *ATA* legislation was enacted. CRA was front and centre in the VSI

process and chose to completely ignore one of the most important issues confronting the charitable sector as it faces its future.

I would also like to clarify that during past debates about whether CRA should be replaced by a Charity Commission, I have publicly supported CRA. I was formerly of the opinion that the problem lay with the common law itself and that the examiners at Charities Directorate were doing as well as might be expected in interpreting a body of law which the courts have frequently remarked is complicated and periodically contradictory. However, having been involved in several appeals against CRA's refusal to register, which had the opportunity to clarify and possibly open up the law, I have formed the opinion that at the most senior policy levels Charities Directorate has absolutely no interest in moving beyond the *status quo*. When one studies the factums submitted on behalf of CRA in the *A.Y.S.A.* and *Travel Just* cases, there can be no doubt that CRA is completely opposed to considering the recent pronouncements of our provincial courts on the law of charity. Instead, it relies completely upon ancient English cases which have, as I have previously described, no sensitivity to our multi-cultural, multi-ethnic and diverse society. Nor does CRA allow the ancient law of England to be modified by *Charter* values.

At another level I am opposed to CRA continuing as the regulator because it has no willingness to consider whether the civil law of Quebec might contribute to the issue of what should be charitable in our bijural nation. English law likely has little more to contribute to our understanding of the common law concept of charity now that England has codified its definition of charity. Any future decisions from England will be interpretations of English statute rather than the common law. Now that England's statutory definition of religion has embraced polytheism, the Canadian authorities will no longer be able to look to decisions of English courts on the crucial matter of religion. Because English law will become increasingly irrelevant, Canada needs a regulator that will consider common law and civil law sources on the meaning of charity until such time as there is a statutory definition of charity.

I think that the evidence provided to this Inquiry establishes that it has been extremely difficult for CRA and the intelligence authorities to develop the trust that is necessary to have ethnic and minority religious charities provide the information needed to stop terrorist activities and funding. This trust will only come if the authorities can build bridges into these communities. I would suggest that the place to begin is with a radical discussion of what purposes merit registered charity status in Canada today, and what tax privileges should be awarded those purposes and organizations. This discussion must result in legislated changes to the definition of charity.

The government needs to consult with the citizens of Canada and negotiate an entirely new social contract that redefines the purposes and activities that should attract tax benefits for donors and tax exemptions for organizations in the future. This consultation must also address three crucial issues. First, we need to determine what regulator is best able to assist and enforce compliance in the sector. Second, we need to decide what responsibilities will be imposed on those who benefit from this new social contract. Finally, given the particular concern about terrorism and the need to build trust within distinct communities in Canada, we need to consider whether the sector should be encouraged to police itself through the creation of informal community regulators.

If this exercise is to be meaningful and productive, it needs to include *all* of the participants in Canada's voluntary sector. There is a real danger that ethnic and religious communities who already feel victimized by the system will not want to co-operate with either the government or the regulator in discussing the sensitive issue of terrorist financing. This participation will only take place if it is made clear at the earliest stage that this is not just a talking exercise to justify the imposition of the provisions of the *ATA*. My efforts to deconstruct the law of charity and the role of the regulator have been aimed, in part, at removing the hubris of the *status quo*. Canada can only have a genuine conversation on these issues if we begin by debunking the assumption that we know and can control where it will end.

If we are to have a genuine dialogue on charity regulation that involves the diverse range of participants in the voluntary sector, the dialogue must not be limited to discussing incremental changes to the common law. The common law of charity is rooted in a different country in a different age. If we are to expect Canadians in the twenty-first century to take a discussion of a new social contract seriously, one cannot impose Tudor law as a precondition. In this respect it is worth noting that while the *Preamble* has long been a cornerstone of the law of charity, it was not the product of a great deal of consultation or thought. The *Statute of Charitable Uses, 1601*[1] went from committee stage to being passed by Parliament in fourteen days.[2] In fact, it is possible that the *Preamble* [3] was simply plagiarized from a poem written by William Langford.[4] Likewise, the four-fold classification of charity that we place so much reliance on took up only two paragraphs of a sixty-page decision of the House of Lords, and none of the other Lords even remarked on the issue. Even Lord Macnaghten summed up his discussion with the caveat that it was "a rather academical discussion."[5] It is also possible that the *Pemsel* classification is simply a restatement of a classification put forward by counsel in a previous case.[6]

I believe that this Commission should call for a new social contract between the voluntary sector and the state, which reflects the distinct character of Canada in the twenty-first century rather than nineteenth- and twentieth-century life in England. To distinguish this concept from the common-law concept of charity, I will refer to it as *public benevolence*. The social contract on public benevolence should explicitly deal with terrorism and extremism and seek innovative ways to solve the problem, which is the subject of this Inquiry.

2. Who is the Regulator?

I came the long way to appear at this Inquiry, having stopped in China, Singapore, Malaysia, and England en route. One of the advantages of my frequent travel is that I am exposed to many different models of charity regulation, so I know there are viable alternatives to Canada's current regime. My first stop on this trip was Beijing, where I continued my work advising the committee of the Ministry of Civil Affairs, which is responsible for drafting the law of charity. I have done similar work in the past in Russia, Vietnam, South Africa, and in various countries in Eastern Europe. The point that I continually make in these consultations is that determining who will be the regulator and defining how the regulator will exercise its powers is frequently more important than the technical wording of the law. In Canada we would do well to revisit the significance of the role of the regulator and create a new regulator model that addresses the aspirations and problems of those seeking to do or produce good.

From Beijing I went to Singapore and met with officials who are working on implementing some of the guidelines being prepared for charities since Singapore passed a series of new Regulations related to the Charities Act this year (2007).[7] Last year (2006) Singapore moved the office of the Commissioner of Charities from the Internal Revenue Authority to the Minister for Community Development, Youth and Sports. Canada, like China, could learn a great deal by studying Singapore's Commissioner of Charities and its division of the charitable sector into six different sectors with their own Sector Administrators.[8] There are arguments in favour of putting hospitals and universities, for example, under a different regulatory regime than other registered charities.

It might also interest this Commission to know that the changes in Singapore have brought charities that do not receive donation privileges under this new regulatory regime. However, this change was not motivated primarily by the anti-terrorism concerns that are the subject of this Inquiry.

On this trip I also spent time in England and I know that this Inquiry has previously heard from Kenneth Dibble, the Executive Director, Legal and Compliance for the Charity Commission of England and Wales. I have known Kenneth for more than 20 years and have great deal of respect for Mr. Dibble and the work of the Charity Commission in seeking both to assist the development of charities and to prevent the use of charitable funds for terrorist activities.

Increasingly, I argue in favour of a model similar to the Charity Commission of England and Wales. The Charity Commission has the great advantage of being independent from the tax authorities, so it can act as an advocate and friend of the sector without compromising its interest in making certain that charities do not abuse the tax privileges given to them. The primary concerns of the Charity Commission when registering charities are policy concerns rather than fiscal concerns.

The issue of whether Canada should consider a Charity Commission has been addressed by practitioners such as Arthur Drache as well as various working groups formed by the sector and the federal government. The Voluntary Sector Initiative (VSI) spent a considerable amount of time examining both the Charity Commission model and a modified commission model, but both models were ultimately rejected in favour of keeping CRA as the regulator. In my view, the VSI exercise demonstrates how committed to the *status quo* the charitable sector establishment is.

Suggestions that a Charity Commission model might be relevant to Canada are often dismissed on the basis that Canada has a federal system of government rather than a unitary one. This analysis has always puzzled me. The Charity Commission only has jurisdiction in England and Wales and does not have jurisdiction in Scotland or Northern Ireland. Scotland now has its own statutory definition of charity, which is based on Scottish law rather than English common law,[9] and an independent Office of the Scottish Charity Regulator (OSCR), which keeps a separate register of charities. However, fiscal tax benefits are only available to those Scottish charities that are also charitable under the law of England and Wales.

I met OSCR's Head of Charities on this trip and know that there are problems in having more than one regulator, primarily in relation to the approximately 3,000 Scot-

land-based charities among the 190,000 that are on the register of the Charity Commission. However, there are also benefits in having an alternate source to the English common law to enable the law of charity to evolve.

I realize that there are constitutional problems in developing a national regulator in a federal country like Canada, which has constitutionally granted authority over the supervision of charities to the provinces.[10] However, given the problems I have described with the current regulatory system, there seems to be no reason for holding on so tightly to the *status quo*. Canada would do well to study the models of England and Singapore, as well as its own models, in areas of provincial jurisdiction such as housing and health, before deciding who is the regulator best able to assist and enforce compliance in the sector. Ultimately, Canada needs to develop a model that accommodates its own constitutional structure and its demographic and social challenges. This regulator must be given powers and a profile that will enhance its ability to build trust within the sector. Given the particular concern about terrorism and relationships with distinct communities within Canada, consideration should be given to developing an informal community regulator function, possibly modeled upon the old common law "visitor," to complement the formal regulator, which has ultimate legal authority.

3. The Arguments for a "Made in Canada" Concept of Charity

I am disturbed by the extent to which the meaning of charity in our country is dictated by old English cases, to the exclusion of Canadian law. This was evidenced most recently in the *A.Y.S.A.* decision, in which the CRA successfully argued that provincial statutory definitions of charity and decisions dealing with those definitions were not relevant to the registered charity scheme under the *ITA*.[11] Given how much time I spend traveling, I am aware of how much we can learn from the evolution of the law in other lands. However, I do find it shocking that we import foreign jurisprudence without the slightest regard to whether it conforms to the *Charter* or our own social values.

It seems that there has always been resistance to allowing charitable concepts from legal traditions other than the common law to have any influence on income tax legislation in Canada and the United Kingdom. This was the real issue in the seminal *Pemsel* decision, which arose when a Scotsman became the trustee of an English charitable trust. To avoid having to apply the law of Scotland in England, Lord Macnaghten held that the word *charitable* in a taxing statute must be construed according to English Law."[12] It took Scotland 114 years to partially overcome *Pemsel* by enacting a statutory definition of charity[13] that applies Scottish law rather than English common law. In my view, this is a significant development. Canada, like Scotland, needs Parliament to legislate a definition of charity that is not bound by *Pemsel*.

Like Lord Macnaghten, CRA appears to have a deeply entrenched aversion to allowing any civil-law influences into the interpretation of charity and gift. I have, in the past, publicly criticized the fact that, despite many court decisions applying the Civil Code provisions on gifts, there is not a single CRA publication that even mentions Quebec law with regard to gifts to charities. Certainly CRA has consistently argued for an exclusively common-law definition of charity in any registration case I am aware of.

However, I believe that the law of charity must be understood and shaped in a way that is consistent with the legal and cultural framework in which it evolves. Given that Canada is a bijural country, the law of public benevolence should fully embrace whatever innovative concepts the civil law of Quebec brings to the table. For example, there is no doctrine prohibiting political purposes in the civil law. This would present an opportunity to expose the intellectual contradictions in the common law doctrine preventing political purposes, and determine whether they are sustainable in the age of the *Charter*. There are also problems arising from the common law definition of religion, which might be addressed by applying the civil law concept of pious causes. It would also be necessary to examine the civil law tradition to find doctrines that are problematic from an anti-terrorism perspective. For example, more than one thousand years prior to the enactment of the *Statute of Charitable Uses, 1601,* the Roman Emperor Justinian included provisions regarding donations for the redemption of captives in his comprehensive legal code.[14]

The arguments in favour of a "Made in Canada" law of charity will become particularly compelling if this Commission finds that the anti-terrorism legislation enacted since 9/11 has not been successful in stemming the use of charity funds for terrorism. My personal view is that the *ATA* is the legal equivalent of using conventional tank warfare strategies to fight an insurgency. It is a particularly blunt and ineffective mechanism for motivating charities to engage in proper conduct and best practices. It has no sensitivity to Canada's multiculturalism, diversity, pluralism, charitable traditions, or the innate desire of its citizens to "do or produce good." The *ATA* will ultimately prove to be as useless, and counterproductive, in the war on charities funding terrorism, as was the bombing of Baghdad. To the extent that government officials believe this draconian legislation is the answer to the problem, time is being lost and energy is being diverted from finding solutions that are effective.

I am also of the view that Canada's anti-terrorism legislation was enacted, at least in part, to convince President Bush and others who are far removed from the realities of the Canadian charitable sector that Canada was fully engaged in the war on terror despite its refusal to join the coalition invading Iraq. When Parliament passed *CRSIA* months after September 11, 2001, it demonstrated that the legislation was anything but "Made in Canada," by stating that the "purpose of this Act is to demonstrate Canada's commitment to participating in concerted international efforts to deny support to those who engage in terrorist activities."[15] No thought was given, in other words, to the particularities of Canadian society, our charitable sector, or the legal framework within which it operates.

I do not have the time to provide a comparative analysis of the constitutional frameworks within which charities in Canada, England, and the United States operate, but I believe this issue to be critically important to the recommendations available to this Inquiry. England has no constitution and much of our received jurisprudence which shapes the common law on "the advancement of religion" stems from England's historical experiences with the Protestant Reformation and its creation of an "established" church. When the Puritans fled England to settle in America they created a new nation with a Constitution, the first amendment of which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Requiring religious charities to be regulated by the Internal Revenue Service is understood to be an infringement of this constitutional guarantee of the free exercise of religion.

Consequently, churches, synagogues, mosques, and temples in the United States do not have to register with the Internal Revenue Service in order to issue charitable donation receipts and do not file an equivalent to the T3010 Public Information Return required of Canadian churches, synagogues, mosques, and temples.

If this Commission was operating under the legal constraints of the U.S. Constitution, it might come to the same conclusion as the framers of the *Patriot Act*, namely that draconian anti-terrorism legislation is the only way to deal with problems in the religious charity sector. However, Canada does not have an established church and requires religious charities to register just like any other charity. Consequently, Canada has much subtler legal options available to it when regulating religious charities. Canada should be the first country to stand up and say that we will not mindlessly adopt legislation that is shaped by constitutional constraints which do not apply in Canada. Unless the Canadian public comes to believe that the government's response to terrorist financing has taken into account the peculiarly Canadian manifestations of the problem, as well as the particular character of the Canadian charitable sector, non-compliance will remain an obstacle to success.

4. Develop a New Concept of Public Benevolence

The first step in devising a new social contract between the voluntary sector and the government would be for the government to commit to a new statutory definition of public benevolence, one which breaks with the narrow concept of charity. The common law of charity is rooted in Christian doctrines that prevailed in sixteenth-century Tudor England. For example, the concepts of the trust and trustee have strong parallels with the notion of "stewardship" in the parables of Jesus. In order to genuinely include ethnic and religious charities in the reconfiguration of the charitable sector, the concept of religion must be examined from the perspective of the *Charter* and current Canadian values. This would involve looking at the current theological bias in favour of monotheistic religions and, for example, embracing polytheism for Hindus and the absence of a supreme being for Buddhists.

There should be an open discussion on the extent to which *Charter* values should shape the concept of public benevolence. We should examine whether the concept of public benevolence should embrace the purpose of teaching and preserving the language and culture of immigrants. The old case of *Williams' Trustees*[16] should be confined to its foreign cultural context, and public benevolence should be defined in a way that welcomes and promotes immigrant communities and multiculturalism.

We should also examine whether some of the apparently "neutral" or "technical" rules applicable to charities might be incompatible with the religious and cultural values of certain communities. One good example is that the law of trusts has traditionally favoured having charities invest their capital in low-risk debt instruments like Guaranteed Investment Certificates and Term Deposits that produce interest income. This policy orientation has become enshrined in the investment policies condoned by CRA and legislated in the *ITA*. Consequently, a private foundation can have its charitable registration revoked if it "carries on any business."[17]

I am not an Islamic scholar but do know that Islam has a theological prohibition against receiving or giving interest (*riba*). Consequently, Islamic financing has developed unique

mechanisms that operate like joint ventures or mutual-participation ventures to generate profits. These profits would almost always be characterized as income from "business" rather than income from "property" under the *ITA*. Given that a Muslim operating a private foundation must meet the disbursement quotas imposed by the *ITA*, it is interesting to consider whether there could be a *Charter* challenge if the CRA should try to revoke the registration of a Muslim private foundation for using Muslim profit-generating mechanisms that amounted to "carrying on a business." Given the freedom of religion guaranteed to Canadians, why should a Muslim be effectively forced to engage in theologically forbidden interest-generating investments to maintain registration of his private foundation? The process of seeking a new concept of public benevolence should apply this type of analysis and religious sensitivity[18] when looking at the tax and legal provisions that govern the charitable sector, in an effort to negotiate a new social contract that is genuinely inclusive and welcoming to ethnic and religious communities.

However, I am not advocating a one-way accommodation of the concerns of immigrants. The process should also precipitate a frank and unrestricted discussion about the responsibilities that accompany these fiscal privileges. If the voluntary sector wants to be relieved of the *ATA* provisions imposed by suits in Washington DC as a result of 9/11, it must put forward suggestions about how best to prohibit public benevolence organizations from funding terrorism. There must be recognition that if Canada is going to facilitate the religious and cultural practices of ethnic and religious communities, then those communities must help the Canadian authorities to design anti-terrorism funding measures that are practical and workable. Further, these communities must propose and implement reporting solutions that will enable the new regulator and intelligence authorities to learn about possible terrorist activities both in Canada and abroad. The objective is not to simply repeal the *ATA* but to devise "Made in Canada" provisions which will more effectively prevent public benevolence organizations from funding terrorism.

5. Develop a Mechanism to Identify and Report Zealotry

This Commission is mandated to make findings and recommendations with respect to:

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

It is entirely possible that the development of a new social contract between the Sikh religious community and Canada, which is monitored by a more sensitive charity regulator, may be the most effective change to prevent similar terrorist threats in the future. However, in developing a new social contract that addresses the links between terrorist acts and the voluntary sector, we need to recognize that the real problem is not the few dollars which might be diverted to fund terrorism. The real problem is the vast majority of tax-subsidized dollars that go into building and operating churches, synagogues, mosques, and temples where extremism is sometimes preached and hatred is sometimes incited. This Inquiry can do little about websites and the communication of extremism in cyberspace. However, it can draw attention to the disturbing fact that many Canadians first encounter the level of religious fundamentalism and extremism that leads

to terrorism within the comfort and community of registered charities. The solution to this problem must come from within these communities themselves if we are to create legislation that is more sensitive and effective than the *ATA*.

In developing a legal concept of public benevolence, we will need to address the issue of zealotry or whatever term applies to those who take theological, and possibly political, positions to an extreme. In doing so, we may want to look to the notion of "disbenefit," which has recently been introduced into Scotland's charities legislation to address activities that harm the common good.[19] However, the concept of zealotry must be much stronger than the notion of disbenefit and must explicitly contemplate unacceptable radical activities rather than simply being a test that weighs positive versus negative potential outcomes. The analysis will need to be applied to Christian and Jewish communities as well as Muslims, Hindus, and Sikhs. However, the concept of zealotry will also need to be applied to proponents of secular radicalism such as eco-terrorists and animal-rights extremists. Fanaticism is not a problem that exists only in religious communities.

It is one thing to define and label this concept of zealotry. The more difficult task will be to develop a mechanism for reporting it within either an individual registered charity or within a specific sectoral community. One might go back to the history of the common law and modernize the concept and role of the "Visitor." It would be beneficial to develop a two-stage process whereby a person encountering zealotry within a charity first went to that particular charity's Visitor to solve the problem internally before going to the government regulator. The primary objective is to prevent the problem, more than to prosecute an offender. It is necessary to find a mechanism that will engender trust within the community and confidence outside the community. The definition and exercise of the mechanism may necessarily vary among different parts of the charitable sector and it must be a concept that is adaptable to secular as well as religious zealotry. The role of the Visitor could also be adapted so that it functioned as the "contact of first instance" between the regulator and the public benevolence organization.

Registered charities are the single social organization in which immigrants are most likely to invoke and experience all four of the fundamental freedoms set out in the *Charter of Rights and Freedoms*: namely, freedom of conscience and religion; freedom of thought, belief, opinion and expression; freedom of peaceful assembly; and freedom of association. Canadians donating to and volunteering for registered charities have the right to expect regulatory and intelligence sources to protect those fundamental freedoms within Canada, even to the extent of their donations and activities being misapplied by recipient charities to fund, facilitate, or promote terrorist activities. Many people have been victimized by tragic acts of terrorism such as the bombing of Air India flight 182. This Commission must be careful that its recommendations do not inflict a new level of victimization by automatically assuming that innocent donors to and volunteers for ethnic and religious charities that may have some role in terrorist activities are the villains. A mechanism needs to be developed to help people identify and resist forces of zealotry in their own community, and the regulator and other Canadian authorities must be available to act appropriately when given actionable information.

6. Protect Canadians From Foreign Intelligence Agencies

Whether or not this Commission endorses the continued application of the *ATA,* con-

sideration must be given to limiting the extent to which information gathered about Canadian charities and donors is shared with foreign intelligence agencies. It is evident from the evidence provided to this Inquiry that massive resources are being devoted to gathering and disseminating data related to charities and donors. There is an implicit presumption that all of this data is being used only for good. This is an extremely dangerous presumption that should not remain unchallenged.

I previously listed the countries who attended the consultation on UN Security Council Resolution 1373. It should not escape the attention of this Inquiry that India did not attend because Pakistan would not have attended if India were there – and *vice versa*. One of the most worrisome things I experienced in these meetings was talking to senior Pakistani officials and having the sense that they knew considerably more about Muslim charities in Ontario than I did. In the formal sessions, these officials supported the party line of the United Nations and United States, endorsing all of the proposed anti-terrorism provisions designed to prevent Muslim charities from funding terrorist activities in Pakistan. Over coffee I asked the most senior official whether the same standards applied to funding terrorists in Kashmir. I was very forthrightly told that the struggle with India over Kashmir was very different and that the protagonists there were "freedom fighters" rather than "terrorists."

Victims and families of the Air India disaster should not be asked to accept that the anti-terrorism legislation that Canada has implemented to prevent a recurrence of such a tragedy results in the provision of intelligence on the Sikh community in Canada to foreign intelligence services that are hostile to India. This Inquiry should not only inquire about what information is gathered in Canada but make recommendations as to how far that information is disseminated to foreign intelligence services. If Pakistan's Directorate for Inter-Services Intelligence (ISI) does indeed provide support to the Taliban and insurgents in Kashmir,[20] as Benazir Bhutto and expert bodies have suggested, it cannot be appropriate for information gathered on Canadian charities and donors to be given to ISI. Canadians of all religious and ethnic backgrounds should be able to donate to registered charities without worrying that data on their donations and their charity's activities will be indiscriminately passed to intelligence agencies in Pakistan, India, Saudi Arabia or Zimbabwe under the simplistic belief that this information will only be used for the noblest of purposes in the global war on terror. If trust is to be rebuilt with ethnic and minority religious communities, we will need a regulatory regime that asserts Canadian sovereignty over the process of disseminating data collected in and by these communities.

V. Conclusion

This Commission's mandate requires it to make "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." In my opinion, the problems in the current legal framework governing the charitable sector are so fundamental and systemic that we must address them before considering whether "adequate constraints on terrorist financing" have been added to that framework. This may be a blessing in disguise to the extent that it forces Canada to look at the problem in a holistic way. One of the great failings of the *ATA* is that it simply imposes draconian measures on a sector that it does not

understand. These measures were designed for money laundering and still may have a role in fighting terror. However, any strategy that focuses solely on the money trail from registered charities will certainly fail. Time has proved that the war on terror needs to be won in small battles, face to face with the enemy, in a struggle for hearts and minds. These battles for hearts and minds must be carried out in communities across Canada and the world, long before terrorism comes to dominate the agenda.

The difficult question that this Inquiry must address is whether terrorism can be more effectively battled by applying the anti-terrorism, registration, and audit provisions to charities in an increasingly heavy-handed way, or by initiating a dialogue with the diverse members of the charitable sector, which seeks to draw them into a healthy relationship with the regulator and encourages them to police themselves. My views on this issue have already been made clear. While the federal government could clearly limit the scope of "public benevolence" so that it was narrower than the common law concept of charity, and excluded religious or ethnic groups, I believe that Canada has much more to gain by encouraging these communities to continue their activities within the same regulatory framework as other organizations seeking the common good. These organizations will continue to play a vital role in Canada regardless of their status under the *Income Tax Act*. It is in Canada's interest to have them willingly participate in its regulatory scheme.

The difficulty of dealing with these issues through the courts was demonstrated earlier this week when the US prosecutors failed to convict the leaders of Holy Land Foundation for Relief and Development of supporting terrorism after freezing the charity's assets in 2001.[21]

The other difficult question that this Inquiry must address is whether terrorism can more effectively be battled by encouraging responsible engagement by charities in situations of conflict, or by inhibiting their funding and the scope of their activities. In this respect, I would like to close by encouraging the Commission to reflect briefly on the Biblical parable of the Good Samaritan, a paradigmatic illustration of charity which may well be based on a "terrorist act."

Jesus told the parable of the Good Samaritan in answer to the question, "Who is my neighbour?" In Jesus' telling, the Samaritan who stopped on the road to Jericho to give assistance to a beaten and naked stranger was the charitable protagonist whose compassion put two other men who passed the stranger by to shame.[22] However, a modern-day rendition of the Good Samaritan set in today's political theatre might well portray the Samaritan as the villain of the parable. Helping a stranger lying half dead between the cities of Jerusalem and Jericho without first ascertaining that he was not a terrorist would itself be grounds for suspicion. The fact that Samaritans were as reviled in Jesus' time as Islamists are today in the Western world would serve as probable cause to the regulatory authorities seeking to investigate the incident further. The Samaritan's decision to provide financial support not only for the terrorist's immediate needs but also for his rehabilitation would serve as evidence that this was no random act of charity. Because the Samaritan paid the innkeeper for the stranger's expenses with cash rather than a credit card, thus providing a traceable financial record, suspicions of money laundering are added to allegations of funding and facilitating terrorism. One of the consequences of "the world changed after 9/11" is that we are now afraid to treat a potential terrorist as our "neighbour."

The parable of the Good Samaritan also illustrates that religious teachings are a crucial source of the best values enshrined in the notion of public benevolence. The amount of money that religious communities put towards funding the edgy and challenging work of Good Samaritans far exceeds the trickle of funds used to support the terrorists who attacked our "neighbour."

The moral issue raised by the anti-terrorism legislation is whether Canadians will be forced to abandon their innately compassionate response to finding a victim lying naked, beaten, and bleeding on the road to Jericho. Jesus told the parable to inspire people to act like the Samaritan by binding the wounds of victims, taking them to a safe place, and providing money for their recuperation. If the *ATA* becomes the new ethical benchmark of the charitable sector, these acts of mercy will not take place until we have first ascertained whether the person bleeding by the side of the road is on any list of "known terrorists" and our lawyer provides us with an opinion that the person is in no way associated with the terrorists who afflicted the damage on him. In this scenario, the protagonist of the charitable sector would be exemplified by the priest who passed by on the other side of the road. It would be sad if the consequence of the *ATA* is that the priest and the pillar of the establishment who showed no compassion to the stripped and beaten stranger become today's new protagonists, because they did not provide assistance to someone who might be a "terrorist" and therefore remained above suspicion.

As the Commission carries out its task of making recommendations as to "the use or misuse of funds from charitable organizations," it is my sincere hope that the Commission will not cause Canada to reject the paradigm of charity represented by the Good Samaritan by adopting the *ATA* definition of "terrorist activities" as its definition of misuse. At a time when even Canada's military forces in Afghanistan are recognizing that the war on terror is ultimately a battle for hearts and minds, Canada needs to deploy more charitable resources rather than fewer in situations plagued by war, violence, and terrorism. Charities have a unique ability to accomplish good in a way that governments and armies cannot in times of conflict, because they address particular concerns and affirm the basic humanity of the communities in which they operate. If governments are going to win the battle for the hearts and minds of the potential proponents of terrorist acts, they must focus their energies on equipping the voluntary sector to become more involved in fighting terror through public benevolence, rather than withdrawing the sector from this difficult but life-affirming work.

Notes

1 43 Eliz. 1, c. 4.

2 I am indebted to my friend Lord Philips of Sudbury for this observation about the timeline. When I reminded him that there was a prior statute of charitable uses in 1597, he said that the time for that statute to go through Parliament from committee stage was fifteen days. Lord Phillips was a driving force behind the *Charities Act, 2006*, which originated in the House of Lords and took more than one year to go through a challenging committee process as well as Parliament.

3 The purposes listed in the Preamble as charitable are: "The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes."

4 Vision of Piers Plowman, written in 1362, which contained the following lines: "And therewith repair hospitals, help sick people, mend bad roads, build up bridges that had been broken down, help maidens to marry or to make them nuns, find food for prisoners and poor people, put scholars to school or to some other craft, help religious orders, and ameliorate rents or taxes."

5 *Pemsel* at p. 583–4.

6 In *Morice v. Durham* at page 531, Sir Samuel Romilly argued: "There are four objects, within one of which all charity, to be administered in this Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; etc.: 2dly, the advancement of learning: 3dly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility."

7 *Charities (Institutions of a Public Character) Regulations 2007* S 89/2007; *Charities (Sector Administrators) Regulations 2007* S 90/2007; *Designation of Sectors Under the Supervision of Sector Administrators 2007* S 91/2007; *Charities (Composition of Offences) Regulations 2007* S 175/2007; *Charities (Fund-Raising Appeals) Regulations 2007* S 176/2007; *Charities (Large Charities) Regulations 2007* S 177/2007; and *Charities (Registration of Charities) Regulations 2007* S 178/2007.

8 The Arts and Heritage sector is under the Ministry of Information, Communications and the Arts; the Education sector is under the Ministry of Education; the Health sector is under the Ministry of Health; the Social Services and Welfare sector is under the National Council of Social Services; the Community sector is under the People's Association, and the Sports sector is under Singapore Sports Council.

9 *Charities and Trustee Investment (Scotland) Act 2005*.

10 Section 92(7) of the Constitution Act reads: "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say…(7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals."

11 *A.Y.S.A.* held at para *29*. However, specific statutory definitions of charity in provincial legislation and decisions dealing with that definition do not dictate the meaning of charity under the *ITA*.

12 *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at p. 587. However, Lord Halsbury, one of the most respected jurists in all of the English Common Law, dissented with Lord Macnaghten and said the law of Scotland should apply: see p. 542. Lord Bramwell also dissented, calling the matter a "very difficult and embarrassing matter" because he had the wisdom to ask whether one would be happy to apply the law of Scotland if the case arose in England: see pp. 567–8.

13 *Charities and Trustee Investment (Scotland) Act 2005*.

14 Cod. 1.3.28. I am indebted to Kathryn Chan's work, "Taxing charities, imposer les organismes de bienfaisance: harmonization and dissonance in Canadian charity law" (to be published in the next volume of the *Canadian Tax Journal*) for this information with regard to the redemption of captives in the Justinian Code and civil law.

15 *CRSIA* s. 2.

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

17 *ITA* s. 149.1(4)(a). "Business" is defined in *ITA* s. 248(1) to include a profession, calling, trade, manufacture or undertaking of any kind whatever.

18 It would also be necessary to determine whether there are theological concepts integral to the Islamic charitable construct known as a *waqf*, which might be problematic from a Canadian perspective.

19 *Charities and Trustee Investment (Scotland) Act 2005* s. 8.

20 See the Council of Foreign Relations publication "The ISI and Terrorism" at http://www.cfr.org/publication/11644/isi_and_terrorism.html#2.

21 On October 22 a federal jury refused to convict in this landmark case, in which the government alleged that $12 million sent to *zakat* committees in the Middle East was supporting the terrorist activities of Hamas.

22 Luke 10:29–37, *New Testament*, New International Version: He asked Jesus, "And who is my neighbour?" In reply Jesus said: "A man was going down from Jerusalem to Jericho, when he fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half-dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he travelled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two silver coins and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.' Which of these three do you think was a neighbour to the man who fell into the hands of robbers?" The expert in the law replied, "The one who had mercy on him." Jesus told him, "Go and do likewise."