

ARTICLE

VILLAINS OR VICTIMS? ANALYZING THE CANADA REVENUE AGENCY'S ROLE IN COUNTERING MONEY LAUNDERING AND TERRORIST FINANCING OFFENCES IN CANADIAN CHARITIES

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ABSTRACT

This paper addresses the role of Canadian charities in the global fight against money laundering and terrorist financing. It highlights how Canadian charities with altruistic motives can suffer as victims both from abuse by bad actors and from the unintended consequences of disproportionate regulation. This paper suggests that Canada's anti-money laundering and anti-terrorist financing regime should evolve to treat charities as co-collaborators in the global fight against terrorist financing instead of villainous vehicles for terrorist entities.

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TABLE OF CONTENTS

INTRODUCTION	109
I. THE <i>MAC V CANADA</i> CASE	109
II. THE GLOBAL RISKS OF ABUSE IN CHARITIES.....	111
A. How Charities are Abused by Bad Actors.....	111
B. The Risks of Charities Regulation	113
C. A Balancing Act for Charities Regulators.....	114
III. THE UNIQUENESS OF CHARITIES AND THEIR LIABILITY	115
A. Regulatory Liability	116
B. Criminal Liability.....	116
C. The Issue with the Canadian Approach	119
D. The United Kingdom’s Approach	120
IV. COLLABORATIVE REGULATION.....	121
A. Charities as Collaborators in AML/ATF	122
B. Towards a Modern Charities Regulator.....	123
C. <i>MAC v Canada</i> Revisited.....	124
CONCLUSION	125

INTRODUCTION

When does a charity cease to be charitable? In Canada, the answer is when a charity stops operating for its valid charitable purpose. A charity's status may be revoked if the regulator finds that a charity has been corrupted by a bad actor for money laundering or terrorist financing purposes. A charity may be abused for terrorist financing when a terrorist or terrorist organization uses a charity to raise or move funds, provide logistical support, encourage or facilitate terrorist recruitment, or otherwise support terrorists or terrorist organizations and operations.¹ At that moment the charity is no longer operating for its legitimate purpose. In the eyes of the state, the charity has become a villain which must be stopped at all costs.

I. THE MAC V CANADA CASE

This drama recently played out in *Muslim Association of Canada v Attorney General of Canada* (“*MAC v Canada*”).² In that case, the Muslim Association of Canada (“MAC”) challenged a Canada Revenue Agency (“CRA”) audit of an Islamic charity due to allegations that the charity had been supporting terrorist entities. MAC is Canada's largest grassroots Islamic charity serving more than 150,000 members of the Canadian Muslim community in cities across Canada.³ It is a robust organization which operates many mosques, community centres, and schools. As a registered charity, MAC relies on donations to fund its operations and programs. In return, MAC may issue tax receipts to its donors. Being a registered charity is essential to MAC's ongoing operations and its organizational development.

The CRA had been auditing MAC since 2015 to determine if its charitable status should be revoked. As the regulator of charities in Canada, the CRA is mandated to ensure that registered charities meet required standards, and in recent years, its mandate has expanded to ensure that terrorist actors do not abuse charities.⁴

The CRA runs these specialized terrorist financing audits through its Risk Assessment Division (“RAD”), which has been set up as part of Canada's international commitments to aid the fight against money laundering and terrorist financing. The RAD was concerned that recent changes to MAC's finances evinced a risk that MAC had been used by terrorist groups for

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- 1 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris, France: FATF, 2023) at 65.
 - 2 *Muslim Association of Canada v Canada (AG)*, 2023 ONSC 5171 [*MAC v Canada*]. Dismissal affirmed on appeal 2024 ONCA 541. While the trial judge's decision was affirmed on appeal the ONCA reminded both the CRA and the courts at para 28 that: “in considering an objection to an assessment or a notice of intent to revoke charitable status, and in vacating, confirming, or varying it, the CRA has an obligation to consider, not only whether the decision respects *Charter* rights, but the relevant values underlying such rights,” citing *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)* 2023 SCC 31 at para 66. This is a notable paragraph as the jurisprudence around *Charter* values and what they require from administrative actors in regard to religious organizations is in its nascency.
 - 3 *Ibid* at para 6.
 - 4 Department of Finance Canada, *Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime Strategy 2023-2026* (Ottawa: Department of Finance Canada, 2023) at 23–24 [Department of Finance Canada, *Canada's AML and ATF Strategy*].

financing purposes. The CRA pointed to the following indicia of risk to justify auditing MAC:

1. MAC received more than \$4.5 million in donations from foreign sources between 2012 and 2014;
2. A foreign donor donated both to MAC and to another organization called the Union of Good which the United States Department of the Treasury designated as an organization “created by Hamas leadership to transfer funds to the terrorist organization...”;
3. MAC and the Muslim Brotherhood, ostensibly a foreign political party, had a public connection;
4. MAC’s assets grew from \$16 million to \$47 million between 2009-2014, particularly in real estate; and
5. MAC conducted fundraising at its events for the *International Relief Fund for the Afflicted and Needy* (“IRFAN”), a listed terrorist entity.⁵

At the Ontario Superior Court of Justice, MAC argued that the RAD’s decision to audit the charity breached its rights under sections 2(a), 2(b), 2(d) and 15 of the *Charter of Rights and Freedoms* (the “*Charter*”).⁶ In particular, MAC asserted that the RAD had a discriminatory anti-Islamic bias. Since 2008, RAD has completed 39 audits. 14 of the audits resulted in a revocation of charitable status, 12 of which were Islamic organizations.⁷

In considering the question of discrimination, Justice Koehnen, wrestled with the fact that both the RAD and MAC could not point to specific evidence to either prove or disprove MAC’s involvement with terrorist entities.⁸ Neither party could identify a bright line rule in Canada’s anti-terrorist financing regime indicating which charitable actions were valid but risky, and which actions stepped over the line into terrorist financing. The Court ultimately allowed the audit to continue, finding the issues to be moot due to the principle of prematurity. However, the Court was sympathetic to the perceived discrimination, writing in *obiter*:

I ask myself whether a Christian or Jewish charity would have its charitable status revoked for similar infractions or whether they would receive some sort of guideline, warning, reprimand or other sanction short of revocation of charitable status.⁹

The Court points to an inherent issue with the RAD’s process. When risk factors for terrorist financing are present, a charity is not given the benefit of the doubt. The RAD engages in an antagonistic auditing process which treats the charity like a villain when in reality, charities may likely be the victims.

This paper analyzes Canada’s regulatory regime for charities and asks why it has taken an antagonistic approach. Part II considers the global discourse on the unique risk factors for

5 *MAC v Canada*, *supra* note 2 at para 32.

6 *Ibid* at para 10.

7 *Ibid* at para 14.

8 *Ibid* at para 61.

9 *Ibid* at para 55.

charities regarding anti-money laundering and anti-terrorist financing. Part III considers how Canada has approached the liability of charities in this area. Part IV considers a more collaborative approach to Canadian charity regulation.

Ultimately, charities should be recognized as victims of corruption instead of villains to be punished. A collaborative approach between regulator and charity could serve Canada's international commitments to anti-money laundering ("AML") and anti-terrorist financing ("ATF") and remedy any potential discriminatory effects those regimes may have.

II. THE GLOBAL RISKS OF ABUSE IN CHARITIES

Canada's approach to AML and ATF is part of a larger global push to ensure charities are not being abused by bad actors. Starting in 2008, reports from the Financial Action Task Force ("FATF") and the Organization for Economic Co-operation and Development ("OECD") have revealed that the abuse of charities globally was becoming more organized and sophisticated.¹⁰ Canada is a member of both FATF and the OECD and has endeavoured to bring Canadian law in line with their recommendations.¹¹

A. How Charities are Abused by Bad Actors

Charities and non-governmental organizations ("NGOs") have been globally recognized as being at high risk for abuse because of their pro-social projects.¹² The fear inherent in AML and ATF regimes may evince a concern that many charities are being set up as vehicles for terrorist entities to operate inconspicuously. While this undoubtedly does occur, the vast majority of charities operate in good faith; however, they may find themselves unwittingly co-opted by bad actors. Charities are at a higher risk of abuse for a number of key reasons.

First, charities enjoy public trust. This trust grants charities access to significant cash flow, especially in the case of a charitable foundation whose purpose is to raise and distribute funds.¹³ The public trust granted to charities has resulted in less suspicion of their financial practices due to their altruistic purposes.¹⁴

10 Organization for Economic Co-operation and Development, *Report on Abuse of Charities for Money-Laundering and Tax Evasion* (Paris, France: OECD Centre for Tax Policy and Administration, 2009).

11 As a brief note, there are differences between charities, NGOs, and non-profits. Different sources will sometimes refer to all three. For clarity, the FATF's definition of a non-profit organization ("NPO"), drawn from *Combating the Abuse of Non-Profit Organisations (Recommendation 8)* (Paris, France: FATF, 2015) is a helpful catch-all: NPO refers to a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works". In this paper, I focus on the risks for charities specifically but will sometimes use NPO when the source uses it.

12 Organization For Economic Co-operation and Development, *Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors* (Paris, France: OECD, 2019) at 23.

13 Financial Action Task Force, *supra* note 1 at 60.

14 Samantha Bricknell et al, *Money Laundering and Terrorism Financing Risks to Australian Non-profit Organisations*, Research and Public Policy Series 114 (Canberra, Australia: Australian Institute of Criminology, 2011) at 9.

Second, certain charities have global networks through their operations networks or through partners in foreign countries. This global presence allows for easy movement of funds and services.¹⁵ Charities that operate in high-risk jurisdictions often execute their humanitarian mission through local partners, which are not always directly supervised by the charity.¹⁶ Depending on the risk of the country where the charity operates, terrorist organizations may infiltrate on-the-ground operations to misuse humanitarian funds and services.¹⁷

Third, charities have a significant cash flow. In general, there is little room for savings and investments since charities typically spend close to 100 percent of their revenue on their charitable mission. A charity's income is made up of a complex web of donations from many different sources. Donations can be anonymous, casual, and conditional. Because of budgetary constraints, charities often under-invest in internal administration and regulatory compliance programs leaving an easier pathway for bad actors to abuse the system.¹⁸ For example, an anonymous donor may donate to a charitable foundation with a specific request that it be used for the furtherance of another organization's mission. That third party organization may be a terrorist group or terrorist affiliated.

Lastly, bad actors can set up an original shell or sham charity whose only goal is the furtherance of terrorist financing or money laundering. As charities have presumptive trust from the communities in which they operate, these charities may exist undisturbed, gain funds from donors, and funnel them to bad actors with little societal oversight.¹⁹ For example, the Canadian non-profit IRFAN was found to have funnelled over 14 million dollars to support Hamas from 2005 to 2009. The CRA revoked their charitable status in 2011 after accounting failures which led to the discovery of ties to terrorist organization Hamas.²⁰ IRFAN continued to operate until 2014 when Canada registered it as a listed terrorist entity.²¹

The risk charities face is best summed up by Samantha Bricknell, an Australian criminologist, who writes:

[the sector's] ultimate vulnerability lies with its social role and the inherent trust it holds with the larger community. Embedding operations into the activities of an organisation that commands responsibility and trustworthiness is the ideal cover for criminal activities... Funds collected on the pretext of charitable use can then be re-routed to the intended recipients, or divided between charitable and terrorist support.

15 Financial Action Task Force, *supra* note 1.

16 Bricknell et al, *supra* note 14 at 9.

17 Financial Action Task Force, *supra* note 1 at 60.

18 Bricknell et al, *supra* note 14 at 9.

19 Organization for Economic Co-operation and Development, *supra* note 12 at 23.

20 Mark Blumberg, "International Relief Fund for the Afflicted and Needy Canada (IRFAN-Canada) Has Status Revoked", *Blumbergs Canadian Charity Law* (11 April 2011) online: <canadiancharitylaw.ca/blog/international_relief_fund_for_the_afflicted_and_needy_canada_irfan-canada_h/> [perma.cc/GAX2-NMHS].

21 *Regulations Amending the Regulations Establishing a List of Entities*, SOR/2014-97.

The latter course can act to reinforce terrorist operations, by cultivating sympathies and developing recruitment grounds for the next cohort of militants.²²

B. The Risks of Charities Regulation

Despite the risks inherent to charities, the global push to close the gap on charity abuse comes with risks to legitimate charitable operations. This can be most significantly observed when charities are caught in a wave of bank de-risking. In the United Kingdom, banks have stopped offering financial services to charities whose operations are high risk after they received pressure from the global community to combat money laundering and terrorist financing.²³ AML and ATF initiatives change the risk calculus for banks and other financial organizations which charities rely on to fulfill their social mission. The result is that charities which are at the greatest risk for abuse based on the severe need they are meeting are also at the greatest risk of being denied access to banking and other financial services.

A report by The Washington Post found that United States-based charities which provide humanitarian aid in high-risk jurisdictions regularly face issues accessing funds from their banks to pay for the services being provided overseas.²⁴ This phenomenon is not restricted to a small group. The report cited research conducted by the Bill and Melinda Gates Foundation, which found that at least 5,875 of the estimated 8,665 United States charities that work overseas have been adversely affected by banking behaviour aimed at disrupting terrorism.²⁵

In Canada, Islamic charities have been under the microscope for over a decade, even apart from the RAD's mandate to combat money laundering and terrorist financing. One mosque in Ottawa had its charitable status revoked in 2018 because it failed the CRA's public benefit test. In the eyes of the CRA, it "allowed its resources to be used for activities that promote hate and intolerance." The CRA's determination was based in part on the fact that the mosque hosted four controversial speakers who made derogatory remarks about women, LGBTQ2S+ individuals, and Jewish people. After an appeal process with the CRA, the mosque's charitable status was restored in 2023.²⁶ The wrongful application of the CRA's regulatory mandate removed the organization's charitable status for five years, which hampered its socially beneficial operations.

22 Bricknell et al, *supra* note 14 at 12.

23 Anna Tims, "Banks accused of putting lives at risk as charity accounts are shut without notice", *The Guardian* (8 May 2017), online: <theguardian.com/money/2017/may/08/banks-charity-accounts-shut-without-notice-money-laundering> [perma.cc/AD73-EFPB]; Shafik Mandhai, "HSBC bank cuts off services to Muslim charity", *Aljazeera* (4 January 2016) online: <aljazeera.com/economy/2016/1/4/hsbc-bank-cuts-off-services-to-muslim-charity> [perma.cc/9WTV-7FQR]; Miles Brignall, "Charities and churches left in financial disarray after Barclays shuts accounts", *The Guardian* (4 December 2023) online: <theguardian.com/money/2023/dec/04/charities-and-churches-left-in-financial-disarray-after-barclays-shut-accounts> [perma.cc/PZ9S-XDCA].

24 Rob Kuznia, "Scrutiny over terrorism funding hampers charitable work in ravaged countries", *The Washington Post* (19 April 2017), online: <washingtontimes.com/national/scrutiny-over-terrorism-funding-hampers-charitable-work-in-ravaged-countries/2017/04/18/146a585a-1305-11e7-9e4f-09aa75d3ec57_story.html> [perma.cc/F5DK-K6QQ].

25 *Ibid.*

26 Sarah Kester, "Ottawa mosque has charity status restored", *CBC* (25 July 2023) online: <cbc.ca/news/canada/ottawa/assalam-mosque-ottawa-charity-appeal-1.6914323> [perma.cc/ENZ2-JJLG].

C. A Balancing Act for Charities Regulators

A full-bore approach to charity regulation is not without its consequences to legitimate charitable activity. Charities are subject to two forms of risk: risk from being abused by bad actors and risk of being hampered by regulation itself. In light of these risks, the FATF passed recommendation eight, which is a guiding principle for FATF parties as they establish AML/ATF regimes. Recommendation eight reads:

Countries should identify the organisations which fall within the FATF definition of non-profit organisations (NPOs) and assess their terrorist financing risks. *Countries should have in place focused, proportionate and risk-based measures, without unduly disrupting or discouraging legitimate NPO activities*, in line with the risk-based approach.

The purpose of these measures is to protect such NPOs from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.²⁷

Recommendation eight recognizes that an overzealous regulatory scheme villainizes the activities of legitimate charities, which is harmful for society. In commenting on recommendation eight, the FATF highlights the vital role charities play globally, specifically highlighting the importance of charities in providing essential services in “high-risk areas and conflict zones.”²⁸ When FATF speaks about charities it does so as if they are collaborators in the fight against global money laundering and terrorist financing.

While Canada’s regulatory regime has implemented recommendation eight, the regime’s success can be judged on how well it has incorporated the balancing principle. So far, Canada’s published AML/ATF guidance takes a less sympathetic approach to charities than one might hope. The *Updated Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (2023) ranked charities and NPOs at high risk for terrorist financing, along with casinos, securities dealers, and legal professionals.²⁹ Canadian charities operating overseas are at the highest risk of abuse, as well as charities which raise funds in Canada to be sent overseas to high-risk areas.³⁰ The Government of Canada reports that the majority of significant terrorist organizations have operated through registered charities.³¹ This assessment makes no mention of the value charities bring to Canadian society or a desire from the federal government to ensure that legitimate charities can pursue their humanitarian ends.

27 Financial Action Task Force, *supra* note 1 [emphasis added].

28 *Ibid* at 60.

29 Department of Finance Canada, *Updated Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (Ottawa: Department of Finance Canada, 2023) at 45.

30 *Ibid* at 76.

31 *Ibid* at 77.

Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime Strategy 2023-2026 lists three pillars for Canada's AML/ATF regime:

1. Policy and coordination;
2. Prevention and detection (which includes compliance programs); and
3. Investigation and disruption.

A key question for policy makers is what the appropriate level of regulatory burden to impose on charitable organizations is.³² Charities operate on tiny margins. Ideally, the charity's revenue will almost entirely go to the facilitation of its program. This leaves little left over for investing in internal control mechanisms.³³ Regulatory compliance programs are difficult to justify investing in when charities struggle to pay their staff. It is especially difficult for small to medium-sized organizations to justify compliance investment.³⁴ Thus, a regulatory balancing act is essential as there is a risk that increased regulation will demand over-compliance from organizations.³⁵ Over-compliance may lead to fatigue and frustration both with the cost of instituting compliance programs and the general frustration of jumping through red tape. The problem may only become more apparent if charity audits continue to be few and far between. Too much regulation without the risk of an audit can incentivize charities to simply ignore compliance altogether.³⁶

While compliance is designed to reduce the need for overbroad enforcement, the paradox is that more regulation, without more enforcement, may result in less compliance.

III. THE UNIQUENESS OF CHARITIES AND THEIR LIABILITY

The non-profit sector is an essential part of Canada's corporate landscape. In 2022, the non-profit sector contributed \$216.5 billion in economic activity, equivalent to 8.2 percent of Canada's gross domestic product.³⁷ Canadian charities are subject to both regulatory and criminal liability. It is because of this trust that abuse of charities by bad actors is morally reprehensible to society, justifying the need for the imposition of criminal liability beyond simple regulatory liability. Charities need to be aware of the liability facing them, or, like MAC, they will be unprepared when the state turns its gaze onto them.

Unlike for-profit corporations which are subject to a range of pecuniary penalties for regulatory breaches, regulatory liability for charities is generally limited to the revocation of charitable status. When considering liability under the *Criminal Code* ("the *Code*"),

32 Department of Finance Canada, *Canada's AML and ATF Strategy*, *supra* note 4 at 7.

33 Bricknell et al, *supra* note 14 at 26.

34 Christine Petrovits, Catherine Shakespeare & Aimee Shih, "The Causes and Consequences of Internal Control Problems in Nonprofit Organizations" (2011) 86:1 Accounting Rev 325.

35 John Boscariol & Gerry Ferguson, "Compliance Programs, Risk Assessments, and Due Diligence" in Gerry Ferguson, ed, *Global Corruption: Its Regulation Under International Conventions, US, UK, and Canadian Law and Practice*, 4th ed (Victoria, British Columbia: University of Victoria Libraries, 2022) vol 2 at 789.

36 *Ibid.*

37 Statistics Canada, *National Insights into Non-profit Organizations, Canadian Survey on Business Conditions, 2023* (Ottawa: Statistics Canada, 2024).

the principles of corporate criminal liability apply to charities in the same way as they apply to for-profit corporations.³⁸

A. Regulatory Liability

The *Income Tax Act* (“*ITA*”) empowers the CRA to function as Canada’s regulator of charities.³⁹ In addition to ensuring that a charity devotes its resources exclusively to furthering its charitable purposes, the CRA’s charities directorate has specific powers through the RAD to audit charities suspected of being abused by terrorist groups.

Under section 149.1(4.1)(f) of the *ITA*, if a registered charity accepts a gift from a foreign state deemed by the Governor in Council to be a supporter of terrorism the CRA may revoke its charity status. Additionally, the Government of Canada has passed the *Charities Registration (Security Information) Act* which allows the express revocation or denial of charitable status through the courts if the charity is connected with terrorism.⁴⁰ Though this act came into force in 2001 as a response to the 9/11 terrorist attack, it does not appear that it has ever been used.

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* was passed to implement the preventative measures required by Canada’s international commitments to fight against money laundering and terrorist financing.⁴¹ The act allows intergovernmental disclosure of suspected proceeds of crime or terrorist financing risk to the CRA.

In total, Canada’s regulatory liability for charities is focused on the revocation of charitable status instead of pecuniary offences. When the Governor in Council determines that a charity is a listed terrorist entity, the revocation of its charitable status is quick without a remedy on appeal.⁴²

B. Criminal Liability

Moral remedies for the corruption of charities are the purview of the criminal law. The definition of “organization” under section 2 of the *Code* includes:

1. A public body, body corporate, society, company, firm, partnership, trade union or municipality, or
2. An association of persons...

38 RSC 1985, c C-46 [*Criminal Code*].

39 RSC, 1985, c 1 (5th Supp).

40 SC 2001, c 41, s 113.

41 SC 2000, c 17, s 36.

42 This response occurred when the CRA revoked the charitable status of both the World Tamil Movement and International Relief Fund for the Afflicted and Needy. See generally Public Safety Canada, “Currently listed entities” (last modified 20 February 2025), online: <publicsafety.gc.ca/cnt/ntnl-scr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> [perma.cc/3XH2-NYX6].

The broad definition specifically applies to societies and grassroots organizations which have yet to be officially incorporated (and thus not subject to regulatory oversight).⁴³

A charity can become a party to crimes committed under its auspices if a senior officer of the charity is negligent in preventing the crime.⁴⁴ For example, if a grant lead at a charitable foundation designs a novel grant without ensuring the grant money was not from the proceeds of crime, the charity may be found to have been an unwitting participant in criminal activity. This is most likely the case when a charity has been abused by internal bad actors.

A charity can also be liable when a senior officer directs the charity to do something illegal, such as money laundering under section 462.3(1) of the *Code*.⁴⁵ For example, such a situation would arise if a grant lead at a foundation sent funds overseas to a terrorist entity listed under section 83.01(1) of the *Code*. These forms of liability apply equally to both charitable organizations (which operate programs) and charitable foundations (which fund operations). The risk factors will vary based on the unique activities of the charitable organization.

Canadian charities may also be found directly liable for terrorism offences under sections 83.02, 83.03, and 83.04 of the *Code* (financing of terrorism charges). To date, there have been no criminal charges brought against charities directly; instead, the Crown has opted to bring charges against individuals.

Canadian charities should also be aware of criminal liability under the *Corruption of Foreign Public Officials Act*.⁴⁶ In 2013, the Government of Canada amended this act to apply to charities under international guidance on the risk factors of charities. Canadian charities may be liable under section 3 for bribing a foreign official to facilitate charitable programs or donations and under section 4 for failing to keep proper books. Though there have been no charities prosecuted under this act, Canadian charities doing international aid work in high-risk areas should be wary of their potential liability.

R v Thambaiturai was the first sentencing under section 83.03 of the *Code*.⁴⁷ This case concerned an individual who raised money to support the World Tamil Movement—a charity which sent funds to the Liberation Tigers of Tamil Eelam. The World Tamil Movement is a now listed terrorist entity but was not at the time of the proceeding. The Crown had the chance to prosecute the charity but chose to focus its action against the individual. The reason for this may have been one of principle, rather than one of law. In law, charities do not have immunity due to their special status as altruistic organizations. As Justice Rosenberg of the Ontario Court of Appeal wrote regarding the criminal liability of the non-profit corporation in *R v Church of Scientology of Toronto*:

43 Such as non-profit organizations designated under a provincial or federal act which includes charities. For the purposes of this paper, I will focus on the liability of charities and not digress into the liability of non-profit societies. Often in the literature, these organizations are conflated. I point out these differences where applicable.

44 *Criminal Code*, *supra* note 38 s 22.1.

45 *Ibid* s 22.2.

46 SC 1998, c. 34.

47 *R v Thambaiturai* 2010 BCSC 1949 at para 9. See also *R v Thambaiturai*, 2011 BCCA 137.

To leave these organizations outside the purview of the criminal law would be intolerable...I can see no rational basis for adopting a different test for criminal liability, in the case of non-profit corporations solely because they do not have shareholders or because any profits are used to promote the objects of the corporation rather than to enrich the shareholders personally. The need for regulation of the conduct of the corporation through the criminal law is the same...the identification doctrine applies.⁴⁸

Although *Church of Scientology* is still good law in Canada, it is not commonly applied as very few charities have faced criminal prosecutions. Canadian court decisions illustrate the conclusion that, in general, the Government of Canada will more readily revoke charitable status via regulatory means and rarely pursue criminal charges against charities themselves.

Starr v Houlden (“*Starr*”) is a prime illustration of the government’s hesitancy to impose criminal liability on a charity itself.⁴⁹ In *Starr*, the president of a charity was alleged to have improperly utilized charitable funds to influence a politician. Instead of prosecuting the charity, the province of Ontario initiated a number of investigations into Ms. Starr for her actions. The Supreme Court of Canada found Ontario’s investigation essentially amounted to a criminal investigation.⁵⁰ Importantly, the investigation focused on Ms. Starr’s actions, rather than the actions of the charity. This is notably different than how for-profit corporations are treated when faced with criminal culpability.

R v Metron Construction Corporation (“*Metron*”) provides a standard example of the Government of Canada’s approach to corporate criminal liability.⁵¹ *Metron* was a criminal prosecution of a construction company for criminal negligence causing death. Three workers and a site supervisor fell to their deaths because of the accused company’s failure to implement proper safety standards. The accused company pleaded guilty, and the proceedings concerned arguments on the appropriate pecuniary sentence to be imposed on the company. There were concurrent regulatory proceedings against the director of the company under Ontario’s workplace health and safety regime.⁵² However, the Crown dropped the criminal charges against the director of the company, though he was still liable to certain regulatory penalties, but pursued the criminal charges against the corporation.

In the context of charities, why are criminal charges pursued against the individuals, while in the for-profit context, criminal charges are more likely to be pursued against the company? While the answer likely turns on the facts known to prosecutors, the difference in treatment likely also has to do with where the moral culpability—and money—lies. Charities are not

48 *R v Church of Scientology of Toronto*, 1997 CanLII 16226 (ONCA), [*Church of Scientology*] is a case in which a charity utilized its resources to secure privileged government employment and then breached the trust of that employment by disclosing information to the charity.

49 *Starr v Houlden*, 1990 CanLII 112 (SCC) [*Starr*].

50 *Ibid*. The question before the Court was focused on the federalism implications of the Province’s investigation. The majority of the Court found that the provincial inquiry was in pith and substance a substitute police investigation into Ms. Starr, which properly should have brought by the Crown pursuant to the federal criminal law powers.

51 *R v Metron Construction Corp*, 2013 ONCA 541 [*Metron*].

52 *Ibid* at paras 24–25.

individually as pecunious as for-profit corporations and so criminal financial penalties may be seen as not worth the effort. Additionally, the Crown may simply find it distasteful to prosecute a charitable organization. Unless a pattern of corruption can be seen throughout the charity, the Crown is more than willing to prosecute the individual bad apple and leave the charity intact.

It is more likely that individuals commit section 380(1) fraud against charities, which while bad, does not evince a broader concern about money laundering and terrorist financing. *R v Motayne*, for example, concerned a senior employee at a Toronto-based charity who defrauded her employer of close to one million dollars over several years.⁵³ As the charity's chief financial officer, she had exclusive control over the charity's payroll and used her position of trust to take advantage of the charity. She was sentenced to six years and six months in jail and her appeals to the Ontario Court of Appeal and the Supreme Court of Canada were dismissed.⁵⁴ Similarly in *R v Dunkers*, the appellant—a bookkeeper at a non-profit organization—used her position of trust to defraud the organization of approximately \$200,000.⁵⁵ The losses resulting from her theft forced the organization to shut down operations. She was convicted and her appeal was dismissed.

Cases of criminal fraud against charities often correspond to society's idea of what a charity is. A charity is fundamentally an altruistic organization, which may become an unwitting victim of crimes committed under its purview. Notably, for-profit companies do not share this presumption. Prosecuting a charitable organization itself would be to make the organization a joint perpetrator in the crime.

C. The Issue with the Canadian Approach

Despite the amount of liability faced by Canadian charities, there are no requirements imposed by legislation to implement AML or ATF compliance programs.⁵⁶ Though the Government of Canada has identified the risk of corruption in the non-profit sector, specifically the risk of terrorist financing, the most recent initiative does not provide guidance on compliance.⁵⁷

Without guidance, Canadian for-profit companies must rely on the court's determination of a reasonable compliance program from the probation order in *R v Niko Resources Ltd*, which relates specifically to guidance under the *Corruption of Foreign Public Officials Act*.⁵⁸

Canadian charities do not benefit from this minimal judicial guidance. Charities need specific guidance which considers their altruistic missions. A water charity which raises funds in Canada to build wells through a partner in Mali, for example, needs guidance to ensure that it is not accidentally supporting an on-the-ground organization with ties to a terrorist organization.

53 *R v Motayne*, 2022 ONCA 701.

54 *Ibid.*

55 *R v Dunkers*, 2018 BCCA 363.

56 Boscariol & Ferguson, *supra* note 35 at 792.

57 Department of Finance Canada, *supra* note 4 at 18.

58 *R v Niko Resources Ltd*, (2011) 101 WCB (2d) 118, 2011 CarswellAlta 2521.

So far, the Government of Canada has created a short checklist for charities to avoid terrorist abuse.⁵⁹ This checklist is cursory and does not provide specific guidance on how to accomplish the tasks it set out. As a such, charities are generally left on their own, attempting to comply with a regime they do not understand. If the Government of Canada approached charities as partners in combatting AML and ATF, perhaps the MAC's ordeal could have been avoided.

D. The United Kingdom's Approach

Unlike Canada, where the CRA wears multiple hats, the United Kingdom has created a separate organization called the Charities Commission ("the Commission") to regulate charities. Since 2013, the Commission has published a robust compliance toolkit to keep charities safe from corruption. The Commission has taken a distinctly supportive approach. Instead of placing charities on notice of this risk they face, the Commission's correspondence uses the language of support and protection for charities. The title of the Commission's AML/ATF compliance toolkit is *Protecting charities from harm*. Instead of framing charities which have risk factors as villains who need to be prosecuted, the United Kingdom's approach treats them as victims of crime, who need to be protected. Following the toolkit will aid United Kingdom-based charities in avoiding liability when an offence has an applicable due diligence defence.⁶⁰ Importantly, the compliance toolkit prevents charities from being taken advantage of in the first place.

The United Kingdom has recently passed the new *Economic Crime and Corporate Transparency Act* ("ECCTA") which applies to large charities as well as for-profit corporations.⁶¹ The act makes the United Kingdom's approach to corporate criminal liability more akin to Canada's, as under this scheme, a company may be corporately liable for the actions of their senior managers. Additionally, the ECCTA created a new strict liability offence of "Failure to Prevent Fraud."⁶² Under this offence, a large charity will incur criminal liability if an employee, agent, subsidiary, or other person performing services on behalf of the organization commits a fraud offence (including AML/ATF offences) intending to benefit the organization. The offence only applies to large organizations (i.e., one with a turnover greater than £35 million, has a balance sheet total of over £18 million, or over 250 employees).⁶³ Interestingly, the offence is one of strict liability. The organization does not need to have knowledge of the fraud to be

59 Canada Revenue Agency, "Checklist: How to protect your charity against terrorist abuse" (last modified 20 August 2024), online: <canada.ca/en/revenue-agency/services/charities-giving/charities/educating-charities-terrorist-abuse/checklist-protect-charity-against-terrorist.html> [perma.cc/22DD-NK6H].

60 Charity Commission for England and Wales, UK and Wales Charities Commission, "Protecting charities from harm: compliance toolkit" (3 September 2013), online <gov.uk/government/collections/protecting-charities-from-harm-compliance-toolkit> [perma.cc/TBS7-J7CN].

61 *Economic Crime and Corporate Transparency Act 2023* (UK), c 56 [ECCTA].

62 *Ibid* at s 199–206.

63 *Ibid*.

held liable for it. The only defence is one of reasonable prevention procedures.⁶⁴

The offence of failing to prevent fraud will automatically put pressure on large charities to establish compliance regimes and organizational procedures to mitigate the chance of fraud occurring, hopefully stopping corruption before it occurs. This is possible only because the Commission has provided sufficient guidance for charities to avoid liability in the first place. Essentially, the offence makes large organizations liable for failing to collaborate with the United Kingdom's government to combat fraud, reinforcing the partnership nature of the United Kingdom's AML and ATF regimes.

IV. COLLABORATIVE REGULATION

To date, there have been very few actionable accounts of charities being used for money laundering or terrorist financing around the world. The leading paper which first raised the vulnerability of the non-profit sector in Australia conceded that while the propensity for abuse by terrorist organizations is a threat, the evidence indicated that the actual exploitation of non-profits for money laundering and terrorist financing is much lower than what has been alleged.⁶⁵ In 2011, there had only been two prosecutions in Australia for money laundering and terrorist financing.⁶⁶ Similarly, in Singapore a string of money laundering cases pushed the Singaporean Commissioner of Charities, Desmond Chin, to release a toolkit for charities to protect themselves from abuse.⁶⁷ While Mr. Chin stated that the Singaporean non-profit sector was at risk of abuse, he also recognized that "to date, there has been no indication of foreign sources of funding flowing into Singapore via the local charity sector to support domestic terrorism-related activities" and that there was "no indication of funds raised by these charities being transmitted to fund terrorism-related activities abroad."⁶⁸

In Canada, there have been 14 charities which have had their charitable status revoked by RAD since 2008 due to suspected terrorist financing. No criminal charges relating to terrorist

64 *Ibid*; See also Home Office, "Economic Crime and Corporate Transparency Act 2023: Guidance to organisations on the offence of failure to prevent fraud" (6 November 2024), online: <gov.uk/government/publications/offence-of-failure-to-prevent-fraud-introduced-by-eccta/economic-crime-and-corporate-transparency-act-2023-guidance-to-organisations-on-the-offence-of-failure-to-prevent-fraud-accessible-version#contents> [perma.cc/XK22-GD44].

65 Bricknell et al, *supra* note 14 at 3, 50.

66 *Ibid* at 57.

67 Singapore Ministry of Culture, Community and Youth, *Terrorist Financing Risk Mitigation Toolkit for Charities* (Singapore: MCCY, 2022); Samuel Devaraj, "Billion-dollar money laundering case: Charities urged to review donor records from Jan 2019", *The Straits Times* (last modified 13 November 2023), online: <straitstimes.com/singapore/courts-crime/billion-dollar-money-laundering-case-charities-urged-to-review-donor-records-from-jan-2019> [perma.cc/48VE-LYBY].

68 Theresa Tan, "No indication of funds flowing into Singapore via charities to support terrorism: Commissioner of Charities", *The Straits Times* (last updated 24 December 2023), online: <straitstimes.com/singapore/no-indication-of-funds-flowing-into-s-pore-via-charities-to-support-terrorism-commissioner-of-charities> [perma.cc/VRC8-26JL].

financing have been laid, however.⁶⁹ If charities and non-profits are at such high risk of abuse, and indeed Canada has at least fourteen cases where a government audit has found significant enough risk to deny charitable status, why is there a lack of criminal prosecutions? One possible explanation is that the regulatory schemes are working as intended. Given the small number of charities identified as being abused (14/86,000 or 0.016 percent), the Government of Canada might consider the revocation of charitable status a sufficient deterrent. Put another way, the current regulation may already act as a proper deterrent for money laundering and terrorist financing—a shield preventing abuse from occurring instead of a sword to punish abuse after it happens. Perhaps, however, this is too optimistic an answer.

A more compelling account may lie in the nature of the charity itself. A charity is a type of organization which fundamentally trades on trust. Governments do not want to run roughshod over the charitable enterprise. Charities provide immense value to society. As such, governments have endeavoured to create regulatory regimes which balance protecting the ability of charities to perform their social function from a position of trust, with a requirement to properly regulate the sector to respond to the legitimate risk of abuse.⁷⁰ Governments may view a highly publicized criminal prosecution of a charity as potentially damaging to the public's trust in the sector as a whole. In light of this hesitancy, the Canadian government may benefit from switching tactics and pursuing trust generation and compliance by reframing their relationships with charities. Charities should be invited to collaborate with the federal government in its AML and ATF efforts.

A. Charities as Collaborators in AML/ATF

While the Government of Canada is aware of the burden regulation can place on charitable organizations, it has yet to embrace charities as partners in the fight against corruption. Neglecting charities in this fight is a missed opportunity. In 2023, there were approximately 86,000 registered charities in Canada accounting for \$304 billion in total revenue and total expenditures of \$281 billion.⁷¹ Such a sizeable industry should be viewed as a collaborator for Canada's AML/ATF goals.

There is a societal expectation that charities act for altruistic purposes.⁷² Charities are allowed to give tax receipts because, in general, the value of an individual donating to a charity will provide more benefits to a society than simply paying tax. In a sense, charities are already collaborating with the state to pursue social goals. Seventy-five percent of Canadian charities are small organizations with four or fewer staff members.⁷³ Opaque or overwhelming regulatory requirements would crush many of these ill-equipped grassroots organizations.

69 Jim Bronskill, "Canada Revenue Agency's Targeting of Muslim charities amounts to discrimination, says civil liberties groups", *CBC* (9 June 2011), online: <[cbc.ca/news/politics/targeting-muslim-charities-1.6059432](https://www.cbc.ca/news/politics/targeting-muslim-charities-1.6059432)> [perma.cc/CG7F-5FBZ].

70 Financial Action Task Force, *supra* note 1.

71 Mark Blumberg, "Key statistics on Canada's charity and non-profit sector 2023", *Blumbergs Canadian Charity Law* (13 January 2023) online: <canadiancharitylaw.ca/blog/key-statistics-on-canadas-charity-and-non-profit-sector-2023/> [perma.cc/6C7V-H4VP].

72 Bricknell et al, *supra* note 14.

73 Statistics Canada, *supra* note 37 at 3.

Some charities (about 1.3 percent) in Canada are sophisticated organizations with over 100 staff members.⁷⁴ These organizations have the administrative depth to properly implement robust compliance programs. Alternatively, well-designed, easily implemented compliance programs would be a boon for all charitable organizations and the Government of Canada would gain strong new partners in the global fight against money laundering and terrorist financing.

B. Towards a Modern Charities Regulator

Charities must be free to exercise their social function while being responsible to protect themselves from abuse.⁷⁵ Regulatory language and government documents should not seek to frame the charitable organization as an enemy. Charities are at risk of being abused by bad actors. The vast majority of charities are not themselves the bad actors. Put another way, while there is some risk that bad actors may design sham, burner, or shell charities to facilitate criminal activity, there is a far greater risk that innocent charities will fall victim to abuse by bad actors.⁷⁶

Instead of positioning itself in opposition to the charity—as in the case of *MAC v Canada*—the Canadian government should establish a regulatory regime which seeks to protect charities from abuse by bad actors by supporting good faith charities. Such an approach will encourage charities to seek assistance from government regulators instead of fearing regulation. Charities should view compliance programs as a benefit to, instead of a burden on, their activities. Such a shift is only possible if the federal government begins seeing charities as collaborators rather than opponents. To make this pivot, the Government of Canada should consider the following initiatives:

1. Create an AML/ATF compliance toolkit for charities.

First, the federal government should devote resources to creating robust compliance toolkits for charities. These toolkits should take into consideration the different risks faced by charitable organizations, charitable foundations, and charities working overseas. The federal government can take inspiration from the toolkits put out by the United Kingdom and Singapore.⁷⁷ More attention should be given to charities at high risk for corruption, particularly those that have substantial overseas operations and work with numerous non-Canadian partners.

2. Encourage charities to establish sources of wealth checks as part of a due diligence process.

Though unexpected donations are often a blessing for Canadian charities, all charities should be wary of donations received without clarity as to the source of funds. Large one-time donations, anonymous donations with conditions, and donations over a certain amount are at particular

⁷⁴ *Ibid.*

⁷⁵ Bricknell et al, *supra* note 14 at 3; Financial Action Task Force, *supra* note 1 at 63; Organization for Economic Co-operation and Development, *supra* note 10.

⁷⁶ Obviously corrupt charities are often accompanied by clear risk indicators, which regulators can turn their intention towards. See generally Organization for Economic Co-operation and Development, *supra* note 10.

⁷⁷ Singapore Ministry of Culture, Community and Youth, *supra* note 67; Charity Commission for England and Wales, *supra* note 60.

risk. Singapore has implemented a requirement for charities to check donations made by new or unknown donors in for more than \$20,000.⁷⁸ This requirement would not unduly hamper smaller charities as they mostly receive smaller donations from established funders.

3. Canada's largest charities should be subject to greater liability.

The Government of Canada should consider adopting a strict liability failure to prevent fraud offences, similar to the United Kingdom's newly established offence in the *ECCTA*. Like the *ECCTA*, it should only apply to the largest Canadian organizations. Of Canada's 86,000 registered charities only about one percent would meet the definition of a large organization.⁷⁹ Large charities are more at risk of abuse than small charities as it is easier to launder a million dollars through a \$50 million organization than in a \$2 million organization. Large charities both have the expertise and resources to establish bespoke due diligence programs and to sustain penalties assigned to them. Establishing such an offence would encourage Canada's largest charities to partner with the government in its fight against money laundering and terrorist financing.

4. The Government of Canada should establish a unique charity commission.

Given the immense scale of Canada's charitable sectors and the unique challenges that come from operating within it, it is about time to provide more resources to regulate charities nationwide. A unique commission would be able to assist grassroots charities in gaining their footing and established charities in performing their due diligence. Like the United Kingdom, Australia, and Singapore commissions, a Canadian Charity Commission would have the expertise to help charities succeed in many ways, including keeping safe from abuse by bad actors. A unique commission with a mandate to support charities—instead of to investigate and punish—would go a long way in understanding charities as both victims of abuse and collaborators in the remedy.

C. *MAC v Canada* Revisited

Reframing the charity as a victim of abuse and a collaborator in a solution may have resulted in a different outcome in *MAC v Canada*. Of the five indicia leading the RAD to audit the MAC, a simple conversation may have explained away two of them. Firstly, the decision acknowledged that there was a difference between the Muslim Brotherhood of Egypt as a political party (which would have been an improper charitable association) and the Muslim Brotherhood as a religious and philosophical movement (which is a valid charitable association).⁸⁰ The decision also acknowledged that RAD did not assess the fundraising scale for the terrorist organization IRFAN. No information was provided by RAD alleging that the fundraising was part of MAC's operations, the actions of a senior officer, or the rogue actions of a single individual.⁸¹

78 *Tan, supra* note 68.

79 *ECCTA, supra* note 61.

80 *MAC v Canada, supra* note 2 at paras 33–34.

81 *Ibid* at para 56.

If the federal government had seen MAC as a collaborator, a well-resourced charities commission could have reached out to MAC before an audit, alerting them to the risk factors identified and requesting preliminary clarity. MAC could then have been given a copy of a compliance toolkit and been informed that dealing with IRFAN after it was labelled a terrorist organization was prohibited. MAC would then have been given the option: comply with the suggestions or face an audit from the CRA. Currently, the CRA has the power and resources to revoke charitable status, but it does not have the resources to help charities protect themselves from abuse.

Moving from an antagonistic system, where the regulator's role is to punish the charity, towards a supportive system where the regulator assists charities in protecting themselves from abusive actors may even provide the solution to the *Charter* questions raised by the *MAC v Canada* case. Positive support for religious organizations would not be characterized as discriminatory. Ultimately, a supportive system—which sees charities as victims, instead of villains—will increase trust in the charitable sector as a whole.

CONCLUSION

Charities trade on trust. It is trust which grants charities their special place in society. Charities do their work because society trusts them to do that work for the benefit of the community. While some may say that regulation improperly prohibits charities from flexibly doing their essential work, proper regulatory oversight can increase society-wide trust in charities overall. Given the altruistic nature of charities, the federal government and the courts should view them as partners with the state in the global fight against money laundering and terrorist financing. Instead of villainizing the charity, the state should invite charities to partner with them in countering corrupt practices.