When Air India Flight 182 was bombed in 1985, anti–terrorist financing (ATF) law did not exist. In Canada, over the past decade, a broad-based legal regime, consisting of the Criminal Code and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, has developed. This regime covers significant regulatory ground and, generally speaking, accords with private and public international law, including the 1267 regime and the 1999 International Convention on the Suppression of Terrorism Financing. But has this regime been effective in fulfilling its stated objective of preventing the funding of terrorist activity? Unless we know the answer – and we do not – we should not be keen to impose additional legal requirements on private or public actors. Regulation is costly, and ineffective regulation imposes unnecessary costs on the private and public sectors. This issue of effectiveness is increasingly important, given the emphasis on terrorist financing in the international community as exemplified in the intergovernmental Financial Action Task Force and the United Nations Security Council. This article recommends a full-fledged assessment of the efficacy of the current ATF regime. Although the argument for undertaking an evaluation of ATF law was presented to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 by the author, the recommendations in the commission’s final report did not address terrorist financing or the need to assess the efficacy of the current legal regime, except for general recommendations about the role of the National Security Advisor. This is a conspicuous omission, given that ATF law has never been assessed or analysed in terms of its efficacy. The underlying assumption appears to be that the regime works well, but this assumption has not been subject to governmental scrutiny let alone empirical assessment.

Keywords: terrorist/financing/Canada/effectiveness

1 Introduction

When Air India Flight 182 was bombed in 1985, anti–terrorist financing (ATF) law did not exist. In Canada, over the past decade, a broad-based legal regime, consisting of the Criminal Code and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, has developed. This regime covers significant regulatory ground and, generally speaking, accords with private and public international law, including the ‘1267 regime’ (the phrase derives from UN Security Council Resolution 1267) and the 1999 International Convention on the Suppression of
Terrorism Financing. But has this regime been effective in fulfilling its stated objective of preventing the funding of terrorist activity? Unless we know the answer – and we do not – we should not be keen to impose additional legal requirements on private or public actors. Regulation is costly, and ineffective regulation imposes unnecessary costs on the private and public sectors. This issue of effectiveness is increasingly important given the emphasis on terrorist financing in the international community as exemplified by the intergovernmental Financial Action Task Force and the United Nations Security Council.

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2 The Financial Action Task Force (FATF), an intergovernmental body that includes terrorist financing in its mandate, was established in 1989, with member countries (there are now thirty-three) ‘represented by sub-state entities like financial supervisors … as well as criminal investigators and prosecutors.’ For a summary of the FATF’s history and contributions, see Richard K Gordon, ‘On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers’ (2010) 88 NCL Rev 501 at 565.


5 For the final report, see Canada, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Air India Flight 182: A Canadian Tragedy – Final
been assessed or analysed in terms of its efficacy. The underlying assumption appears to be that the regime works well, but this assumption has not been subject to governmental scrutiny, let alone empirical assessment.

Part ii outlines the elements of the Canadian legal regime aimed at combating terrorist financing. Part iii outlines the literature on ATF, highlighting that it has not focused on the question of the efficacy of ATF law. Part iv analyses the Air India report’s recommendations concerning efficacy generally as well as cost-benefit analysis (CBA) specifically, focusing on the importance of CBA in the ATF context. Part v concludes.

II Anti–terrorist financing regime

The Canadian ATF regime has two main components: first, the amendments to the Criminal Code of Canada that deal with terrorist financing and related provisions in the Criminal Code; and, second, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Proceeds of Crime Act). As most of this legislation was implemented within the past decade or so, it is ripe for evaluation, especially in light of claims that Canada is a haven for terrorists.

Report (Ottawa: Canadian Government Publishing, 2010), online: Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm> [Air India Inquiry, Final Report]. The report aims to review and evaluate the performance of government agencies during and in the wake of the 1985 bombing of Air India Flight 182. The bombing, which was perpetrated by Sikh terrorists, resulted in the death of 329 passengers after a mid-flight explosion. Two baggage handlers at Tokyo’s Narita Airport were also killed offloading luggage from a Canadian Pacific Airlines flight. The final report contains five volumes: an overview; a volume on pre-bombing events and the post-bombing investigation; a volume on intelligence, evidence, and the challenges of prosecution; a volume on aviation security; and a volume on terrorist financing. Air India Inquiry, Final Report, ibid, vol 1 at ch 7 contains the list of the commission’s recommendations but does not deal with terrorist financing. Some suggestions regarding terrorist financing and the regulation of charities are contained in volume 5.

6 Criminal Code, RSC 1985, c C-46, ss 83.01–83.27.
7 E.g., Criminal Code, ibid, ss 462.32(4), 462.35 relating to the seizing of property and time periods under which property can be detained.
8 Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17 [Proceeds of Crime Act].
9 It should be noted that there are other aspects of the regulatory regime that deal with terrorism as distinct from the financing of terrorism. These are usefully described in the 2006 Arar inquiry report; see Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, A New Review Mechanism for the RCMP’s National Security Activities, (Ottawa: Ministry of Public Works, 2006) c 3.
The *Criminal Code* defines ‘terrorist activity’ as including acts occurring outside or inside Canada that, if committed in Canada, would constitute an offence in relation to providing or collecting property intending or knowing that it will be used for terrorism.\(^{11}\) The list of what actions constitute a ‘terrorist activity’ is lengthy and includes conspiracy, attempt, or threat to commit listed acts or omissions.\(^{12}\) The offences are all indictable offences under which the accused is liable to imprisonment for a term of not more than ten years if convicted.

The *Criminal Code* evidences a multipronged approach to countering terrorist financing. First, under section 83.02, the Code imposes prohibitions on providing or collecting property to carry out terrorist activity. Second, section 83.03 creates an offence for anyone who directly or indirectly collects property, or provides or makes available property for terrorist purposes. Third, section 83.04 creates an offence for using or possessing property for terrorist purposes.\(^{13}\) Fourth, under section 83.05(1), the Governor in Council may establish a non-exhaustive list of entities that have knowingly carried out, facilitated, or attempted to carry out terrorist activities, or knowingly acted on behalf of terrorist entities. Finally, under section 83.11(1), certain listed financial institutions must determine on a continuing basis whether they are in possession or control of such property, and must make reports regarding the same on a monthly basis.\(^{14}\)

In addition, Part xii.2 of the *Criminal Code*, entitled ‘Proceeds of Crime,’ addresses money laundering. If someone deals with property, or any proceeds of property, with the intent to conceal the property, and knowing or believing that all or part of the property was obtained from the commission or omission of a designated offence, he or she is

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11 *Criminal Code*, supra note 6, s 83.01(1)(a)(x) referring to subsection 7(3.73), which implemented the *International Convention for the Suppression of the Financing of Terrorism*, supra note 1.

12 Ibid.

13 *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* (SOR/2001-360). This law is very similar to the *United Nations Suppression of Terrorism Regulations*, which include a separate list of suspected terrorist entities; see David Matas, ‘The New Laws on Terrorist Financing’ (2004) 4 *Asper Review of International Business and Trade Law* 145 at 150. Another set of offences relates to freezing and forfeiture of property; see *Criminal Code*, ibid, s 83.08.

14 Unlike the offences under *Criminal Code*, supra note 6, s 83.02–83.04, these offences are aimed primarily not at terrorists and their supporters but at third parties who might deal with terrorist property. Such third parties may be more amenable to regulation; but, as discussed below, care should be taken not to impose unreasonable and costly burdens on them for reasons relating to economic efficiency. Furthermore, *Criminal Code*, supra note 6, s 83.09 contains an exemption scheme that allows the solicitor general to provide an exemption from liability arising under one of the several provisions that prohibit the financing of terrorists.
liable to be convicted of either an indictable offence or an offence punish- 
able to be convicted of either an indictable offence or an offence pun-
ishable on summary conviction.15 Cases decided under the section indi-
icate that past prosecutions have not involved terrorist activities per se, 
but such activities as drug trafficking16 and, of course, money laundering 
alone.17 Terrorism can be financed not only by money derived from 
crime, but also by money derived from other sources, including legiti-
mate earnings and funds given to charities.18

There is some overlap between the Criminal Code provisions and those in the Proceeds of Crime Act discussed below, which suggests that the law contains redundancies and raises the question of whether the anti-
terrorist financing area is ‘over-regulated.’ Both pieces of legislation 
contain provisions that aim to address money laundering. In addition, 
both contain reporting requirements. The Criminal Code requires that 
every person in Canada, and every Canadian outside of Canada, disclose 
information about a transaction, or proposed transaction, in respect of property owned or controlled by, or on behalf of, a terrorist group. Similarly, the Proceeds of Crime Act contains reporting requirements that apply to a list of entities that closely resembles the list contained in the Criminal Code. Finally, both have provisions relating to the compilation of a list of terrorist entities; and they both seek to target entities that ‘facilitate’ the financing of terrorist activities.19

While the Criminal Code addresses a variety of activities that relate to 
terrorist financing (from providing property, to assisting in terrorist finan-
cing, to money laundering) and criminalizes such activity, the Proceeds of Crime Act deals with reporting requirements, cross-border movement of currency, and the creation of an agency to administer the Act. Under the Act, defined individuals and entities report transactions ‘in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of ... a terrorist activity financing offence.’20 
In addition, if these individuals and entities are required to make a report under section 83.1 of the Criminal Code, they must also make the report to the agency that is responsible for administering the Proceeds

15 Criminal Code, supra note 6, ss 462.31(1), 462.31(2).
16 See e.g., Giles v Canada (1991), 63 CCC (3d) 184, 12 WCB (2d) 163.
17 R v Hape (2000), 148 CCC (3d) 530, 47 WCB (2d) 568.
18 See David G Duff, ‘Charities and Terrorist Financing’ (2011) 61:1 UTLJ [this issue]; 
Mark Sidel, ‘Choices and Approaches: Anti-terrorism Law and Civil Society in the 
United States and the United Kingdom after September 11’ (2011) 61:1 UTLJ [this 
issue].
19 For the disclosure rule, see Criminal Code, supra note 6 s 83.1(1); for the establishment 
of a list, see ibid, s 83.05; for the proceeds-of-crime list, see Proceeds of Crime Act, supra 
ote note 8, s 5; reporting requirements are in ibid, s 5.
20 Proceeds of Crime Act, ibid, s 7.
FINTRAC’s purpose is to facilitate the detection, prevention, and deterrence of money laundering and the financing of terrorist activities. FINTRAC also has the authority to receive voluntary information from various sectors of the public, including law enforcement agencies, about suspicions of terrorist financing. Every person or entity that breaches the reporting requirements contained in the Act is liable, on summary conviction, to a $500,000 fine or six months in prison or both for first time offences.

Under the Act, the persons and entities that have obligations to monitor and to report to FINTRAC include authorized banks, cooperative credit societies, loan and trust companies, portfolio managers, securities dealers, casinos, and various other business entities. Amendments to the Act which were implemented further to Bill C-25 enacted at the end of 2006 broaden the list of persons and entities required to engage in record-keeping and reporting of activities; this list now includes businesses such as banks and other financial institutions that deal in securities or any other financial instruments, for example. The amendments also broaden the scope of the reporting obligation. Whereas the unamended Act requires reporting of every financial transaction that occurs and is related to the commission of a terrorist activity financing offence, the amendments deal with ‘every financial transaction that occurs or that is attempted...’

III Assessing efficacy

Whether in describing the current legal regime or in arguing for heightened regulation, the academic literature tends to assume the necessity and efficacy of ATF measures without acknowledging the paucity of evidence proving the assumption. On the issue of terrorist groups’
participation in the electoral process, for example, Peter Margulies favours a pragmatic approach consisting of ‘a repertoire of tools and institutions,’ of which seeking transparency in terrorist groups’ financial structure is one element. Terrorist groups, Margulies argues, should be compelled to open their books to international monitors, much as countries allow international monitoring of nuclear energy programs. Nina Crimm contends that it is time for a reconsideration of the ATF regime implemented following 11 September 2001, calling for more ‘nuanced, targeted, and tailored approaches’ in order to undermine current terrorist financing tactics. Ross Panko argues that the USA Patriot Act’s requirements for due diligence, record keeping, and reporting are a necessary response to the threat of terrorist financing. The absence of any analysis of the efficacy of the existing ATF regulation is a weakness in these authors’ arguments.

This weakness is made more conspicuous by the fact that the literature on the legal regime governing anti–money laundering (AML), the regulatory model that is related to and, in fact, precedes ATF law, has, to some extent, focused on the issue of efficacy. For example, Donato Masciandaro and Raffaella Barone offer an economic analysis that estimates the costs and benefits of AML regulation, concluding that more effective, globally centred AML regulation is warranted. Masciandaro and Umberto Filotto illustrate the link between the effectiveness of AML regulation and the compliance costs involved for banks. In particular, the authors demonstrate that there is a cost associated with AML regulation and that the marginal costs borne by financial intermediaries will rise as one aims to eliminate a higher and higher percentage of the illegal conduct. Antonello Biagioli asserts that the quantification of money laundering and estimation of financial crimes generally are relevant in assessing the impact of illegal funds on the economy.

Barrachdi asks whether policy makers in Europe have been successful in reducing organized crime and underlines the importance of creating an incentive for banks to make disclosures regarding transactions. This relatively rich literature relating to the efficacy of AML regulation highlights the comparative absence of such discussion in the ATF context.

Once we recognize the importance of evaluating efficacy, the issue of empirical method arises: how do we ascertain the efficacy of ATF law? Generally speaking, cost benefit analysis (CBA) is a tool that allows governments to evaluate policy initiatives and make decisions about whether they should be implemented in light of the perceived or expected benefits, on the one hand, and the anticipated costs, on the other. It can be relevant to both positive and normative analyses, but the two are surely interrelated: a finding, as a descriptive matter, that the costs of ATF laws exceed the benefits is at least relevant to (though perhaps not determinative of) whether such laws should remain in place. As Nikos Passas explains, unless we engage in CBA, ‘we do not know at which point we may over-shoot and reach a point of diminishing returns at national and international levels.’

Yet even in the AML literature that discusses the importance of evaluating efficacy, the discussion of CBA is somewhat superficial. For example, Biagioli provides some estimates of the costs of money laundering drawn from other authors. These cost estimates are neither specific or disaggregated and they are not weighed against corresponding benefits. Masciandaro and Barone’s analysis is more sophisticated theoretically, as they build their examination on an economic model, but they do not supply any specific figures that would render their conclusions more widely applicable; that is, more informative as to the need for regulatory change or not. Passas underscores the importance of CBA but does not provide specific guidance on how it should be undertaken on a practical level.

35 Robert H Frank, ‘Why Is Cost-Benefit Analysis So Controversial?’ (2000) 29:2 J Legal Stud 913. The somewhat obvious associated policy stance is that only those policies where net benefits exceed costs (however both are calculated) should be adopted.
38 Biagioli, supra note 33 at 92.
39 Masciandaro & Barone, supra note 31 at 11.
40 See Passas supra note 37.
The paucity of detailed CBA in the ATF literature, and even in this AML literature, is somewhat surprising, given the prominence of CBA in the broader academic literature.41 Perhaps this gap in the literature is a response to the discrediting of CBA over the years. In particular, critics have argued that CBA is shallow because a financial metric cannot be used for measuring benefits relative to costs (although both, in fact, are difficult to quantify) and the costs of a policy cannot be compared with the benefits because the two are incommensurable.42 For example, while the costs of ATF law could be estimated by, among other things, analysing the costs incurred by individual financial institutions in complying with their obligations to track and report withdrawals over a certain monetary amount, the benefits are intangible. How do we attach a monetary value to preventing terrorists from accessing funds to finance criminal activity and keeping citizens safe as a result?43

Despite these types of criticisms, CBA and variations of CBA continue to be considered in policy making because of the importance of evaluating the potential effects of a proposed or existing policy.44 In the ATF area, this main concern appears to be that having no law would be

42 Frank, supra note 35, provides the following example: ‘[W]hen a power plant pollutes the air, our gains from the cheap power thus obtained simply cannot be compared with the pristine view of the Grand Canyon we sacrifice.’
43 It is this search for quantifying costs and benefits that leads to the criticism that CBA is morally void. Martha Nussbaum, for example, disavows CBA because it does not allow a consideration of whether the policy would occasion (directly or indirectly) serious wrong-doing; see Martha Nussbaum, ‘The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis’ (2000) 29 J Legal Stud 1005.
44 In the securities regulatory field, for example, the US Securities and Exchange Commission, and to a lesser extent the Ontario Securities Commission, routinely incorporate CBA into their rule-making procedure. See, e.g., Securities Act (Ontario), RSO 1990, c S.5 s 143. For discussion, see Edward Sherwin, ‘The Cost Benefit Analysis of Financial Regulation’ [Draft as of 19 December 2005], online: Harvard Law School <http://www.law.harvard.edu/faculty/hjackson/projects.php>; subsequently published in (2006) 12 Stanford J Bus & Fin 1. Note, also, that a more flexible iteration of CBA exists in Regulatory Impact Analysis (RIA), a technique that includes specific steps such as identifying and quantifying the impact of the legislation; isolating alternatives (which may be non-law based) to address the problem; undertaking risk-based analysis; and consulting affected parties. RIA includes CBA, to the extent that it is feasible, and also other considerations that defy quantification – such as equity and fairness, which are important, especially from a public-interest standpoint. The attempt is to assess the positive and negative effects of a proposed policy rather than the strict costs and benefits alone; see, e.g., OECD, Directorate for Public Governance and Territorial Development, Regulatory Impact Analysis: A Tool for Policy Coherence, OECD Reviews of Regulatory Reform (Paris: OECD, 2009), online: OECD <http://www.oecd.org/document/49/0,3343,en_2649_34141_35258801_1_1_1_1,00&&en-USS_01DBC.html>.
immoral because it is unsafe and/or puts Canada in breach of its international obligation to implement a legal regime that prevents terrorists from obtaining financing to fund criminal activities. While this perceived benefit cannot be quantified in the way that CBA may demand, the costs of a proposed law or policy are not irrelevant to whether it should be implemented, and some means should be considered and employed to assess such costs. The absence of an examination of such questions in the literature is surprising.

IV Efficacy and the Air India report

Although it has been a decade since ATF laws were implemented, a full-blown, systematic evaluation of anti–terrorist financing laws has not occurred. Perhaps for this reason, the Air India report examined a number of domestic and international reviews of terrorist financing laws, including one from the Auditor General of Canada, but none of these reviews contained a CBA or systematic empirical research.

45 As the Chairman of the Standing Senate Committee on Banking, Trade and Commerce notes, ‘This measure, in our belief, goes to the heart of the integrity and transparency of the Canadian economy so that Canada can maintain its reputation around the world as an honest and forthright economy that stems, as best it can, the flow of illicit money through our economy’; Debates of the Senate, 39th Parl, 1st Sess, No 12 (6 December 2006) (Hon Senator Jerahmiel S Grafstein), online: Parliament of Canada [http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/bank-e/12cv-e.htm?Language=E&Parl=39&Ses=1&comm_id=3].

46 Admittedly, the considerations are complex. For example, the international community externalizes costs by relying on countries to establish anti–terrorist financing laws, the costs of which are borne by a country’s private sector. This seems unfair and, at the very least, calls for some justification: given that combating terrorism is a public mandate, why should a small subset of the public be burdened with providing a collective good enjoyed by the polity as a whole?

47 See Air India Inquiry, Final Report, supra note 5, vol 5 at ch 4. The report explains that Ekos Research Associates performed an ‘internal evaluation’ of Canada’s anti–money laundering and anti–terrorist financing initiative and states, ibid at 172, that a full evaluation of the initiative should be conducted before 2009. A submission to the Standing Senate Committee on Banking, Trade and Commerce examining Bill C-25 remains pertinent: ‘[T]he questions of proportionality (the extent to which the proposed measures are proportionate and commensurate with the risks at play) and necessity (the extent to which the measures are necessary based on empirical evidence) have not been appropriately addressed’; Office of the Privacy Commissioner of Canada, ‘Submission to the Standing Senate Committee on Banking, Trade and Commerce’ (13 December 2006), online: Office of the Privacy Commission [http://www.privcom.gc.ca/parl/2006/sub_061213_e.asp]>; Canada, Senate, Standing Committee on Banking, Trade and Commerce, Stemming the Flow of Illicit Money: A Priority for Canada (October 2006) 1 at 1, online: Parliament of Canada [http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/bank-e/rep-e/rep09oct06-e.pdf].
In a similar spirit, the report also listed a series of ‘performance indicators’ for assessing terrorist financing regimes. The first of these – ‘the need for better mechanisms to review performance’ – simply underscores the point that no comprehensive evaluation of the efficacy of ATF law has been undertaken to date. Other ‘indicators’ include the number of prosecutions and convictions, value of intelligence obtained, number of entities ‘listed’ under the Criminal Code, number and monetary value of frozen accounts, and lastly FINTRAC’s performance (which necessitates a separate evaluation as part of an overall analysis of ATF laws in Canada). These factors are, indeed, relevant to evaluating the current regime, but it is doubtful that they are exhaustive, as they do not contemplate an analysis of the efficacy of the entire ATF regime (along the lines of CBA), which would be necessary to reach a conclusion about whether and to what extent the regime should remain in place.

In short, the Air India report’s list of factors does not go far enough. Crucial questions about effectiveness remain to be examined in a systematic way. For instance, although FINTRAC states that it has received numerous reports under the Proceeds of Crime Act, it is not clear whether this body is actually catching those individuals involved in terrorist financing. Further, the Criminal Code contains relatively new provisions relating to terrorist financing, and it is unclear whether these provisions are effective. The systematic assessment proposed here would involve a statement of the objectives of terrorist financing legislation as a whole and an explanation of how the current legal regime seeks to achieve these objectives. It would then move to analyse the efficacy of the regime from an empirical standpoint.

It might be argued that, thus far, this article falls prey to its own criticism of the ATF literature: it does not enter into a discussion of methodology, of costs and benefits. Consider this discussion of compliance costs of ATF legislation in the UK context:

The compliance costs for financial institutions are substantial. Graham Dillon of KPMG, a consultancy, reckons it costs each mid-tier bank in Britain £3m–4m (US$5m–6m) to implement a global screening programme that involves regularly

48 Air India Inquiry, Final Report, supra note 5, vol 5, ch 7 at 239. The report further states, ‘There is a shortage of evidence that the anti-TF program has produced concrete results ... More comprehensive statistics would give a better understanding of the anti-TF program and facilitate regular international and domestic assessments of its performance’; ibid at 239–40.

49 Ibid at 239–46.

checking customer names – and those of third parties involved in their trans-
actions – against United Nations embargo and American sanctions lists for poss-
ible terrorist matches. He reckons multinational banks each spend another
£2m–3m per year to oversee implementation in their far-flung operations
(such institutions commonly have 70 to 100 different transaction systems). In
addition, ‘tens of millions of pounds’ are spent each year in London alone on
data storage and retrieval to satisfy a requirement that banks’ client and trans-
action data be kept for five to seven years. Similar rules exist in America,
Singapore and other European countries.51

Thus, monitoring and reporting terrorist financing activity is costly and,
by implication, has the potential to threaten the economic activity of
private businesses.52 As suggested in the quotation, there will be increases
in internal management costs and operational costs for banks themselves
as they implement and enforce far-reaching reporting procedures such as
those stipulated in the Proceeds of Crime Act. Organizations, especially
smaller organizations, may disproportionately bear the reporting
burden in terms of monitoring and reporting costs. These costs need
to be listed, evaluated, and quantified.53

Admittedly, there are negative externalities, faced largely by private
parties, which are not so readily quantifiable. For example, the possibility
that someone’s personal information regarding her financial transactions
may be disclosed or reported creates a disincentive to deal with the bank,
despite the fact that the bank is not engaging in terrorist financing at all.54
There is, thus, a potential that financial institutions will suffer a loss of
customer base under the legislative scheme. In addition, the legislative
regime may be responsible for sending financing of terrorist activities
underground to hawala and other entities; that is, away from banks and
regulated entities.55

82, online: The Economist <http://www.economist.com/displaystory.cfm?story_id=
5053373> [The Economist].
52 Kevin E Davis, ‘The Financial War on Terrorism’ in Victor V Ramraj, Michael Hor, and
53 Admittedly, determining the total cost of complying with anti–terrorism financing
regulations is difficult, as the Economist states, ‘because many institutions (private and
governmental) tackle the issue in tandem with money laundering, a separate
financial crime. The British Bankers’ Association (BBA) estimates that banks in
Britain spend about £250m each year to comply with regulations on the two sorts of
crime. According to a global study of about 200 banks last year by KPMG, those
interviewed increased investments on anti-money-laundering activities by an average
of 61% in the prior three years’; The Economist, supra note 51.
54 See ibid.
55 See Tom Naylor, Satanic Purses (Montreal: McGill-Queen’s University Press, 2006) at
152–66.
In terms of benefits, we cannot assess the utility of a legal regime designed to deter terrorist financing without considering the number of terrorists who have been caught under the regime. Inherent in assessing the benefit side of the equation is analysing the number of prosecutions and convictions under the law. This number is low in the Canadian context. With the exception of one recent case relating to the financing the Liberation Tigers of Tamil Eelam through the World Tamil Movement, no Canadian ATF prosecutions have been launched. This low number is cause for concern, especially given the high costs that the legal apparatus imposes on the private sector. Thus, while a deeper analysis of costs and benefits is necessary, even a superficial CBA suggests that the costs of Canada’s ATF regime outweigh the benefits.

V Conclusion

The recommendations of the Air India report may well lead to new laws. This article has argued that, as the report’s recommendations are considered and certainly before new law is passed, an assessment of the efficacy of Canada’s current ATF regime is required. This assessment would be a logical first step towards understanding whether (and where) additional laws are necessary.

Our expectations about what law can achieve should be reasonable and well informed; that is, we should not advocate a specific set of legal reforms in the absence of evidence that this particular reform (as opposed to other available alternatives) is warranted. ATF regulation is costly in the sense that it imposes burdens on entities that fall under the regulation. Those burdens may, indeed, be justified but they must be proven to be so. Otherwise, the regulation is nothing more than an experiment, and likely a costly one.


57 Reference may be made to the prosecution of Mohammad Momin Khawaja, who was arrested on 29 March 2004 and charged with, and convicted of, participating in the activities of a terrorist group and facilitating a terrorist activity contrary to Criminal Code, supra note 6, s 83.03; see R v Khawaja (2009), 248 CCC (3d) 233. Khawaja’s conviction has been appealed but no decision has been released from the Court of Appeal (Ontario).