

# ACCS Working Group on National Inherent Risk Assessment 2023

## Report and Recommendations

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### I. Executive Summary and Recommendations

In March 2023, the Ministry of Finance published an updated National Inherent Risk Assessment (NIRA) of Canada’s anti-money laundering and anti-terrorism financing regime (hereinafter, AML/ATF regime). The NIRA addresses the threats to Canada’s financial system of both money laundering and terrorism financing. It also assesses, sector by sector, where Canada’s economy is vulnerable to being abused for money laundering and/or terrorism financing purposes. The NIRA is Canada’s response to the Financial Action Task Force’s (FATF) Recommendation 1, which asks countries to provide a periodic assessment of its AML/AFT regime and its effectiveness. Canada creates these documents in anticipation of FATF’s assessment and evaluation of the country’s performance. These assessments are called Mutual Evaluations, and result in an FATF report on Canada’s performance. The last mutual evaluation of Canada was in 2016. In the 2023 NIRA, Canada follows FATF’s Recommendation 8 and addresses the vulnerability of Canada’s charitable sector. According to FATF Recommendation 8, charities are vulnerable to terrorism

financing (though not money laundering). NIRA 2023, following FATF recommendations, assesses Canada's charitable sector as "highly" vulnerable to terrorism financing.

In the shadow of the released NIRA 2023, the Canadian charitable sector has increasingly expressed concerns about CRA audits of charities that fall within the ambit of the CRA's participation in Canada's AML/AFT regime. These concerns were first brought to light in 2021 by two reports. One report, published by the University of Toronto, examined three audits of Muslim-led charities and raised concerns about bias. A second report, by the International Civil Liberties Monitoring Group, raised concerns about possible over-representation of Muslim-led charities subject to deregistration through AML/AFT regime audit strategies. These reports, along with the Government of Canada's concern about systemic Islamophobia, led the Prime Minister and Minister of National Revenue to order a review of the CRA audits for bias, led by the Office of the Taxpayers' Ombudsperson (OTO). That review was limited by the OTO's incapacity to access relevant materials. Thereafter, the National Security Intelligence Review Agency (NSIRA) undertook a review, which is still in progress at the time of writing. In this same period, the Senate Committee on Human Rights examined Islamophobia in Canada, focusing in part on the CRA's regulation of Muslim-identified charities. During the NIRA Working Group's consultation, a Muslim-identified charity, the Muslim Association of Canada, sued the Government of Canada for violating its *Charter* rights through an adverse audit process.

These incidents and concerns prompted the creation of the NIRA Working Group, comprised of ACCS members Anver M. Emon (Chair), Jean-Marc Mangin, and Kevin McCort. The Working Group's aim was to determine whether and to what extent the findings by the Senate and other bodies might be redressed through changes in the methodologies of AML/AFT risk-assessment. NIRA WG members expressed concern that the approach Canada adopts does not effectively account for (a) variations within the charitable sector; (b) the work the Government, reporting entities under the PCMLTFA, and charities have done since 11 September 2001 to ensure against the risk of terrorism financing; or (c) the unintended consequences the current AML/AFT regime—as presented in the NIRA—has on both government departments/agencies and private sector reporting entities under the PCMLTFA. These concerns coincide with critical analysis by the Global NPO Coalition on the FATF on the unintended consequences of FATF Recommendation 8.

Through consultations and independent research, the NIRA Working Group advises the ACCS to issue the below listed recommendations. Because the CRA is subject to a whole-of-government policy on money laundering and terrorism financing, the recommendations to the Minister of National Revenue and Commissioner necessarily involve consultations with other Ministries, in particular the Ministry of Finance and the Ministry of Public Safety.

**Recommendation 1:** *The ACCS advises the Minister of National Revenue and Commissioner of the CRA to strongly advocate that the Ministry of Finance evaluate the charitable sector's vulnerability using a combination of inherent and residual risk analysis. The current approach of only publishing an inherent risk assessment runs contrary to growing international practice and indulges in an abstracted notion of risk devoid of regulatory and compliance context. This*

*methodology is not informative of the actual risk environment facing the charitable sector, and overdetermines the vulnerability of Canada's charitable sector. This undermines public confidence in the sector, in particular with reporting entities under the PCMLTFA. This shift in methodology would make Canada's approach consistent with evolving international standards and remain consistent with FATF guidelines.*

**Recommendation 2:** *The ACCS recommends to the Minister of National Revenue and the Commissioner of the CRA to strongly advocate that the Ministry of Finance, in its next revision of the NIRA for publication, develop and publish guidance to the 13 participating Departments and Agencies on how they may both fulfill their AML/AFT regulatory role and maintain compliance with the Charter of Rights and Freedoms. Developing and publishing such guidance will also signal to PCMLTFA reporting entities to consider their obligations under relevant provincial and federal human rights codes, thereby controlling for unintended consequences of AML/AFT compliance requirements.*

**Recommendation 3:** *The ACCS recommends to the Minister of National Revenue and Commissioner of the CRA to strongly advocate that the Ministry of Finance, in its next iteration of the NIRA, involve the Ministry of WAGE to develop and provide a GBA+ analysis of the NIRA and that the published draft of the NIRA include a section offering guidance on how the 13 Departments and Agencies may integrate GBA+ in how they assess risk and perform their duties to combat terrorism financing. Publishing such guidance will also signal to PCMLTFA reporting entities that they must consider their own risk-assessment practices from this perspective, which will help control against unintended consequences of AML/AFT compliance requirements.*

**Recommendation 4:** *The ACCS recommends to the Minister of National Revenue and the Commissioner of the CRA to secure clarification from the Ministry of Public Safety on whether and to what extent the new amendments to the Criminal Code under C41 constitute rejections of the Government of Canada's commitment to the fungibility thesis. In the event the fungibility thesis remains valid policy, the Minister of National Revenue and the Commissioner of the CRA should develop and publish guidance for the charitable sector on how to maneuver around contradictions between C41 amendments and the fungibility thesis.*

**Recommendation 5:** *The ACCS recommends to the Minister of National Revenue and the Commissioner of the CRA to strongly advocate that the Ministers of Public Safety, Global Affairs Canada, and Citizenship and Immigration create an Advisory Body to review C41 information responses, applications, and application decisions consisting of representatives from Public Safety, Global Affairs Canada, Citizenship and Immigration Canada, and leading humanitarian and development aid coordinating bodies in Canada (e.g., Cooperation Canada and Humanitarian Coalition).*

## II. Introduction

In the April 2023 ACCS in-person meeting in Toronto, Ontario, discussion among ACCS members focused on priority issues for the ACCS to address. Prior to the meeting, Finance Canada issued an updated National Inherent Risk Assessment (NIRA) in March 2023, in anticipation of Canada's mutual evaluation before the Financial Action Task Force (FATF). The NIRA outlines Canada's efforts to combat money laundering and terrorism financing, in compliance with FATF guidelines. The Government of Canada produces the NIRA as part of its compliance with FATF recommendations. In 2012 when FATF restructured its 40+9 recommendations into a single set of 40 AML/ATF recommendations, its revised Recommendation 1 required countries to "identify, assess, and understand the money laundering and terrorist financing risks for the country." This was not part of the earlier FATF recommendation scheme.

To comply with FATF recommendations in anticipation of a mutual evaluation, countries like Canada develop and publish national risk assessment reports. In anticipation of Canada's 2016 mutual evaluation by the FATF, the Ministry of Finance issued its first National Inherent Risk Assessment (NIRA 2015) report. As that report indicated, it was prepared as a response to the "revised Financial Action Task Force's (FATF) global AML/ATF standards calling on all members to undergo an assessment of ML/TF risks. This report will be considered as part of the upcoming FATF Mutual Evaluation of Canada, which will assess Canada against these global standards."<sup>1</sup> At the time of writing, the most updated NIRA was issued in March 2023 in anticipation of Canada's next mutual evaluation. While the FATF is one audience for the NIRA, so too are those entities in Canada's private sector that are subject to the PCMLTFA as reporting entities. As NIRA 2023 explains:

This report provides critical risk information to the public and, in particular, to over 24,000 regulated entities across the country that have reporting obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA), whose understanding of inherent, foundational money laundering and terrorist financing risks is vital in applying the preventive measures and controls required to effectively mitigate these risks.<sup>2</sup>

In fact, the 2015 and 2023 reports go so far as to say: "The Government of Canada expects that this report will be used by financial institutions and other reporting entities to contribute to their understanding of how and where they may be most vulnerable and exposed to inherent ML/TF risks."<sup>3</sup> By publishing the NIRA openly, the Government of Canada communicates with all private sector entities (e.g., banks, trusts, foreign exchanges, money service businesses) required under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) to file Suspicious Transaction Reports, Terrorist Property Reports, and Large Cash Transaction Reports

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<sup>1</sup> NIRA 2015, 7

<sup>2</sup> NIRA 2023, 4, footnote omitted.

<sup>3</sup> NIRA 2015, 14. NIRA 2023 has almost exact language, except that it spells out ML/TF. NIRA 2023, 12.

to the Financial Transactions and Analysis Center (FINTRAC). These are the same institutions that provide financial services to registered charities.

Publishing the report openly and online serves important regulatory purposes consistent with the values of democracy and the rule of law. It provides notice to the relevant sectors on how they can conduct their affairs within the limits of the law. But those same values inform the NIRA Working Group's concern that the NIRA's methodology compounds extant democratic accountability problems in how Canada complies with FATF recommendations across all relevant sectors. We appreciate the importance of preserving national security; we also appreciate the global coordination required per multilateral soft law guidelines to which Canada is committed. At the same time, we also recognize that FATF Recommendations are a form of "soft law" that, by their very nature, pose democratic accountability concerns to Canadians and Canadian sectors. This democratic problem is compounded by Finance Canada's continued insistence on only publishing an "inherent" risk analysis.

Charities offer an important litmus test for assessing the consistency of multilateral softlaw guidelines with the capacity of domestic actors, such as charities, to conduct their affairs freely. This is most obviously seen in autocratic regimes that subject the charitable sector to undue suspicion. Canadians have the privilege of residing in a democratic state committed to freedom and liberty. But just because that is our form of government does not mean we should lower our vigilance in support of those same values. The ACCS remains committed to supporting the vibrancy and integrity of Canada's charitable sector. To that end, the ACCS struck a Working Group to study NIRA 2023 from the perspective of the charitable sector. The NIRA Working Group was comprised of ACCS sector members Anver M. Emon (Chair), Jean-Marc Mangin, and Kevin McCort. The Working Group benefited from the volunteered policy expertise of Sara Krynitzki, a policy analyst for Philanthropic Foundations Canada. The aim of this Report to the ACCS is to showcase the Working Group's and ACCS' vigilance for the charitable sector as we also respect the important work Canada's national security officials undertake on our collective behalf with respect to multilateral softlaw guidelines.

The NIRA is developed by Finance Canada in consultation with 13 participating Departments and Agencies, including the CRA. The CRA's regulatory and audit functions over charities play an important role in executing the Government's anti-terrorism financing policies. According to the FATF, charities are vulnerable to terrorist threat actors because they can be (inadvertent) conduits of financing to support terrorism. FATF Recommendation 8 asserts: :

Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk based approach, to such non-profit organisations to protect them 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 organisations.<sup>4</sup>

The FATF provides an updated interpretation of this recommendation, based on considerable advocacy from the global NPO sector. It reminds the international community about the important role not-for-profit organizations play globally:

NPOs play a vital role in the world economy and in many national economies and social systems. Their efforts complement the activity of the governmental and business sectors in providing essential services, comfort and hope to those in need around the world. The FATF recognizes the vital importance of NPOs in providing these important charitable services, as well as the difficulty of providing assistance to those in need, often in high risk areas and conflict zones, and applauds the efforts of NPOs to meet such needs. The FATF also recognises the intent and efforts to date of NPOs to promote transparency within their operations and to prevent terrorist financing abuse.<sup>5</sup>

Canada's NIRA 2023 does not characterize the charitable sector with the nuance that the FATF interpretive note offers. Rather, NIRA 2023 baldly states:

in the context of terrorism and terrorist financing in Canada, the registered charities and non-profit organizations operating overseas are most vulnerable, as funds or goods may be abused at the point of distribution by the charity or partner organizations. Charities may also unwittingly support terrorist organizations abroad by paying taxes and tolls to operate in certain areas, when these are directly or indirectly controlled by the terrorist organizations. Organizations that operate domestically, within a population that is actively targeted by terrorist movement for support and cover, are also exposed to terrorist financing risks, as resources generated in Canada may be transferred internationally to support terrorism if the organization does not conduct sufficient due diligence or provide sufficient oversight of donees, or exercise direction and control over the end-use of its resources.<sup>6</sup>

#### A. The NIRA is ripe for ACCS consideration

The NIRA Working Group was formed to analyze NIRA 2023 from a charity-centric perspective. There are four reasons why NIRA 2023 falls within the ACCS mandate vis-a-vis Canada's charitable sector.

First, since 2001, when Recommendation 8 was first issued, there has been very little critical analysis of its impact on the Canadian charitable sector; this stands in stark contrast to Europe

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<sup>4</sup> FATF, *FATF Recommendations: International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation* (Updated 2023), 13. Online: [www.fatf-gafi.org](http://www.fatf-gafi.org)

<sup>5</sup> FATF, *FATF Recommendations*, 58.

<sup>6</sup> NIRA 2023, 76.

and the US, where charity advocacy groups have actively advocated with both the FATF Secretariat and their respective governments (EU, EU member states, and the US government). A collective body known as the Global NPO Coalition on the FATF exists principally to advocate for the charitable sector with the FATF Secretariat and the unintended consequences of how state parties implement Recommendation 8. Though Canadian government officials interact regularly with the FATF Secretariat, Canada's charities and not-for-profit sector advocates have little engagement with the Coalition or its mandate to support the world's charitable sector. The Working Group inaugurated consultation with this global advocacy body, representatives of which provided essential context and critical review of NIRA 2023.

Second, as noted above, FATF Recommendation 8 specifically identifies charities as highly vulnerable to terrorism financing. In both NIRA 2015 and NIRA 2023, the Government of Canada rates the charitable sector as highly vulnerable to terrorism financing.

NIRA 2015 explains as follows:

In the context of terrorism and terrorist financing in Canada, the registered charities at higher TF risk are the ones operating in close proximity to an active terrorist threat. Those operating overseas are most vulnerable, as funds or goods may be abused at the point of distribution by the charity or partner organizations. Registered charities that operate domestically, within a population that is actively targeted by a terrorist movement for support and cover, are also exposed to TF risks, as resources generated in Canada may be transferred internationally to support terrorism if the organization does not exercise direction and control over the end-use of its resources. The majority of the TF actors associated with the assessed terrorist groups have used registered charities.<sup>7</sup>

NIRA 2023 expands on the 2015 rationale as already noted above.

In recent years, due to considerable advocacy by the Global NPO Coalition on the FATF, the FATF revised its interpretation and guidance on Recommendation 8 to demand better consideration for preserving national security while upholding the public benefit that charities fulfill and serve. Unlike Canada's NIRA 2023, the FATF's interpretive notes to Recommendation 8, as quoted above, expressly acknowledge the important role charities play in society. Moreover, the FATF has cautioned state parties to undertake a more targeted approach to rating the vulnerability of its charitable sector. Its 2016 revisions to Recommendation 8 and its interpretive note (INR8) were based on an appreciation that

not all NPOs were particularly vulnerable to [terrorism financing] abuse and that only a subset of NPOs identified by countries should be subject to [Recommendation] 8 requirements. The amendments also clarified that a 'one-size-fits-all' approach to the measures called for under R.8/INR.8 is inconsistent with a risk-based approach and

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<sup>7</sup> NIRA 2015, 64.

explained that countries should implement such measures based on the [terrorism financing] risks they have identified.<sup>8</sup>

Third, the NIRA Working Group recognizes that the absence of effective charitable-sector advocacy with respect to FATF Recommendation 8 has left Finance Canada, the CRA, and other agencies and departments without guidance from the sector on effective calibration between national security and the public benefit that Canada's vibrant charitable sector provides. The ACCS is one of the few bodies capable of addressing the appropriate calibration that satisfies Canada's compliance with FATF recommendations and supports a vibrant charitable sector.

Fourth, NIRA 2023 is especially appropriate for the ACCS to examine given public debates in recent years on whether the operationalization of Government of Canada policies on terrorism financing have discriminatory effect on a subset of Canada's charitable sector. This issue has been part of the current ACCS's deliberations, given accusations of bias in CRA audits of Muslim-led charities.

Two reports were issued in 2021 addressing possible bias at the nexus between charities regulation, national security, and terrorism financing. The first report, *Under Layered Suspicion*,<sup>9</sup> examined three audits of Muslim-led charities to illustrate concerns about evidence selection bias, interpretive bias. The second report, *The CRA's Prejudiced Audits*,<sup>10</sup> was published shortly thereafter. Among its various concerns was the disproportionate number of Muslim charities deregistered after an audit led by the CRA's Research Analysis Division (RAD) which has a mandate to apply Canada's AML/AFT regime to the charitable sector. The report claimed that from 2008-2015, 75% of all charities revoked by RAD were Muslim-led charities.

In July 2021, upon the conclusion of the Federal Government's Islamophobia Summit, the Prime Minister and Minister of National Revenue tasked the Office of the Taxpayers' Ombudsperson to conduct a review of CRA audits to assess the process on equity grounds. The Ombudsperson, François Boileau, issued his report *Charity Begins with Fairness: More to Explore* in March 2023 noting that he was unable to fulfill his mandate due to privacy concerns of charities, CRA secrecy around its risk modeling, and secrecy around security intelligence.<sup>11</sup> The Ombudsperson addressed the ACCS during its June 2023 in-person meeting in Ottawa, where he expressed frustration at the democratic unaccountability that the review process illuminated: the OTO was unable to conduct an equity-based review of an agency within his own Ministry. Shortly

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<sup>8</sup> FATF, *Best Practices: Combating the Terrorist Financing Abuse of Non-Profit Organisations*, November 2023, 6. Online: <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/BPP-Combating-TF-Abuse-NPO-R8.pdf.coredownload.inline.pdf>

<sup>9</sup> Anver M. Emon and Nadia Z. Hasan, *Under Layered Suspicion: A Review of CRA Audits of Muslim-led Charities* (Toronto: University of Toronto, 2021), online: [www.layeredsuspicion.ca](http://www.layeredsuspicion.ca).

<sup>10</sup> Tim McSorely, *The CRA's Prejudiced Audits: Counter-Terrorism and the Targeting of Muslim Charities in Canada* (Ottawa: International Civil Liberties Monitoring Group, 2021). Online: <https://iclmg.ca/prejudiced-audits/>

<sup>11</sup> The report can be found at the Office of the Taxpayers' Ombudsperson online: <https://www.canada.ca/en/taxpayers-ombudsperson/programs/reports-publications/special-reports/charity-begins-with-fairness.html>



thereafter, the National Security Intelligence Review Agency (NSIRA) issued a notice to the Minister of National Revenue that it would conduct its own review of CRA audits for potential bias. That review was in progress at the time of writing.

Lastly, two charities made headlines in Canada for litigation they initiated. Islamic Relief Canada sued Thomas Quiggin and others for defamation. At issue in the case regarding Quiggin was a report he authored that made spurious accusations against Islamic Relief Canada as a conduit of terrorism and terrorism financing. Islamic Relief Canada is among the largest humanitarian relief organizations in Canada, and a member in good standing with both the Humanitarian Coalition—a 12-member coalition of Canada’s leading international relief agencies—and Cooperation Canada. Quiggin has a history of serving as a terrorism expert. He is now remembered for his role in the Freedom Convoy, providing leadership as the Convoy occupied the streets of Ottawa for weeks.<sup>12</sup> Quiggin and Islamic Relief Canada settled the case out of court, with Quiggin agreeing to remove his report from circulation. Though that report is now difficult to find online, his other publications are featured in Public Safety’s online library catalog.<sup>13</sup>

A second charity, the Muslim Association of Canada sued the CRA for discrimination and religious freedom violations under Sections 2 and 15 of the *Charter of Rights and Freedoms*. The Ontario Superior Court issued its judgment in the case in August 2023.<sup>14</sup> Koehnen J., who decided the case, avoided a decision on the merits by holding that the case was premature and so not appropriate for a court to judge. Koehnen J. was unable to identify a *Charter* violation in the Government’s risk-based analysis model, claiming that despite the focus on Muslim-identified groups, “[o]ne of the sad realities of the world we live in is that there are a wide range of terrorist groups that cloak themselves in the banner of certain nationalities, ethnicities or religions... In recent years, one major source of such threats has involved groups that pervert Islam and falsely cloak themselves in its mantle.”<sup>15</sup> Nevertheless, Koehnen J. offered in *obiter dicta* observations on the case that has raised concerns for the sector. Expressing sympathy with many of the charity’s arguments, Koehnen J. intimated plausible bias despite refusing to decide as much as a matter of fact or of law. For example, noting that the audit of MAC was on terrorism financing grounds, Koehnen J. remarked:

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<sup>12</sup> Judy Trinh, “How organizers with police and military expertise may be helping Ottawa convoy protest dig in,” *CBC News*, 10 February 2022. Online: <https://www.cbc.ca/news/canada/convoy-protesters-police-tactical-knowledge-1.6345854>

<sup>13</sup> Public Safety’s library catalog can be found here: <https://www.publicsafety.gc.ca/cnt/rsrscs/lbrr/ctlg/index-en.aspx>. At the time of writing, the Working Group did a search on Quiggin’s name and located two published sources of his that remain part of the security institution’s collection. During its consultation with RAD officials, NIRA Working Group members queried whether RAD or the Charities Directorate would review prior deregistrations for their reliance on the Quiggin Report. We were told that RAD considers evidence at a certain point in time, and as a policy, does not go back and change past decisions just because the information relied upon may later be found to be unreliable.

<sup>14</sup> *Muslim Association of Canada v. Attorney General of Canada*, 2023 ONSC 5171. Online: <https://canlii.ca/t/k07t8> (hereinafter *MAC v. Attorney General of Canada*).

<sup>15</sup> *MAC v. Attorney General of Canada*, 2023 ONSC at ¶126.

It is difficult to understand how makeup classes, sugar shacks, puppet shows, ski trips, dodgeball, movie and karaoke nights, ping-pong, air hockey tables or “a play mat with toys for smaller children” relate to terrorism. Once again, I would be surprised if a church or synagogue had its charitable status revoked because it offered any of these activities.<sup>16</sup>

Later, the Court commented on the CRA’s revocation of MAC’s charitable status due to its Eid festivals:

Quite apart from the fact that social activity can be an essential part of religious activity in the sense that observation of a religious event promotes a sense of community, I again find myself asking whether CRA would revoke the status of a Christian charity because it organized Christmas parties or Thanksgiving dinners or whether it would revoke the status of a Jewish charity because it organized Seders or Succoth dinners for new immigrants.<sup>17</sup>

In a separate proceeding, Koehnen J. refused to award the Government of Canada legal fees assessed against the charity (approx. \$220,000), despite such awards being standard practice in litigation. Koehnen J. explained that the litigation was in the public interest. “The vast majority of the findings on which the revocation recommendation was based were, as noted in my reasons, ones that I did not believe would ever be used to revoke the charitable status of a Christian or Jewish charity.” Koehnen J. characterized the CRA’s actions as “overreach” and considered the litigation an opportunity for government agencies to refine “their processes to ensure that minority groups are dealt with fairly and equitably.”<sup>18</sup>

*MAC v. Attorney General of Canada*, though technically decided in favour of the Government of Canada, feeds sectors concern about the fairness of charities regulation when conducted considering whole of government policies such as anti-terrorism financing. This case makes NIRA 2023 particularly ripe for ACCS consideration.

## B. Working Group Consultations

The NIRA Working Group undertook its review of NIRA 2023 in the shadow of public debate about equity, fairness, national security, and charity audits. The NIRA Working Group had the privilege of consulting key offices within the Government that have carriage of mandates that can and do affect the charities sector. The below table lists the government offices and charity sector representatives that appeared before the NIRA Working Group to support its mandate:

<p><b>Review and Analysis Division (RAD)</b> <b>Canada Revenue Agency</b> Sophie Amberg, Director</p>
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<sup>16</sup> *MAC v. Attorney General of Canada*, 2023 ONSC at 52.

<sup>17</sup> *MAC v. Attorney General of Canada*, 2023 ONSC at ¶154.

<sup>18</sup> “Judge rejects federal bid to recoup legal expenses in Muslim charity court case,” *CBC News*, 4 January 2024. Online: <https://www.cbc.ca/news/politics/muslim-charity-legal-expenses-1.7074534> (25 January 2024).

Ralitza Koterlitzova, Senior Policy Advisor
<b>Ministry of Finance</b> Blaine Langdon, Justin Brown, Cameron Scobie, and Anthony Miller
<b>Global Affairs Canada</b> Katherine Surmanski, Camille Pabalan, Nancy Segal, Catherine Shipton
<b>Humanitarian Charity Representatives</b> Kate Higgin, Cooperation Canada Richard Morgan, Humanitarian Coalition
<b>Global NPO Coalition on the FATF</b> Sangeeta Goswami, Human Security Collective Ashleigh Subramanian-Montgomery, Charity and Security

The NIRA Working Group wishes to extend its sincere thanks to the members of the above offices who supported its mandate. The discussions were not always easy. These are difficult matters that intersect complex and sometimes incongruent purposes: advancing the charitable sector; upholding national security and secrecy; maintaining multilateral obligations; regulating charities; and enabling greater equity, diversity, and inclusion. Civil servants in the Government have important jobs to do; they perform their tasks within the operational protocols of their Ministry, Department, or Agency; and sometimes they must consider intelligence sources to which all are not privy. At the same time, the NIRA Working Group—consistent with both the Senate and the Ontario Superior Court—has identified features of NIRA 2023 that require further consideration and refinement with respect to the regulation of charities in Canada.

### III. The Use of “Inherent Risk” is Methodologically Insufficient for Effective Identification of Vulnerabilities in Canada

Reading both the 2015 and 2023 reports, one feature is striking, namely the exclusive focus on “inherent risk” as the singular feature of risk assessment methodology. In both reports, the Government of Canada explains its goal, namely, to identify “the fundamental risks in Canada that are the subject of the broad suite of government and private sector controls and activities to effectively mitigate those risks.”<sup>19</sup> To assess these “fundamental risks”, Finance Canada adopts “inherent risk assessment” as its method of analysis. The NIRA defines “inherent risk” as follows: “the properties in a sector, product, service, distribution channel, customer base, institution, system, structure or jurisdiction that threat actors can exploit to launder proceeds of crime or to fund terrorism.”<sup>20</sup> Importantly, the NIRA explains the utility of focusing exclusively on *inherent* risk: “Understanding Canada’s risk context and the *intrinsic properties* that expose sectors and products to inherent money laundering and terrorist financing risks in Canada is important to being able to identify and apply measures to effectively mitigate them.”<sup>21</sup>

<sup>19</sup> NIRA 2015, 15; NIRA 2023, 13.

<sup>20</sup> NIRA 2014, 15; NIRA 2023, 13

<sup>21</sup> NIRA 2023, 13, emphasis added. For similar language, see NIRA 2015, 15, which uses “main characteristics” in place of “intrinsic properties”.

The NIRA then identifies the types of threat for both money laundering and terrorism financing. In the case of money laundering, it rates a wide range of threats pursuant to the following scale: low, medium, high, and very high.<sup>22</sup> In the case of terrorism financing, the 2015 NIRA provided a table of groups that pose the greatest threat of terrorism financing in Canada. That 2015 table is reproduced below:

**Table: NIRA 2015’s Terrorist Financing Threat Groups of Actors<sup>23</sup>**

Al Qaeda in the Arabian Peninsula	Hizballah
Al Qaeda Core	Islamic State of Iraq and Syria
Al Qaeda in the Islamic Maghreb	Jabhat Al-Nusra
Al Shabaab	Khalistani Extremist Groups
Foreign Fighters/Extremist Travelers	Liberation Tigers of Tamil Eelam
Hamas	

Notably, the 2015 NIRA came under scrutiny for associating 100% of inherent terrorist financing risk with threat actors that map onto Canada’s racial and religious minorities, and over 80% of that risk of threat with groups that map onto Canada’s Muslim-identified communities.<sup>24</sup> This assessment of threat was especially confounding given developments in Canada’s domestic landscape post-2015, such as the so-called “Freedom Convoy”, in which domestic extremists, using trucks and other vehicles, disrupted Canada’s national capital, Ottawa, for weeks. Municipal and federal leaders denounced the protest as sedition,<sup>25</sup> with Ottawa’s mayor declaring a state of emergency.<sup>26</sup> As data leaks revealed that crowd funding platforms were used to support the convoy,<sup>27</sup> the government quickly issued new regulations under the PCMLTFA to ensure crowd funding platforms were subject to reporting obligations under the PCMLTFA.<sup>28</sup>

The 2023 NIRA has since modified the table of terrorist financing threat groups. That table now reads as follows:

<sup>22</sup> See, for instance, NIRA 2015, 19; NIRA 2023, 18. The 2023 NIRA did not include a “low” rating for money laundering threats.

<sup>23</sup> NIRA 2015, 28.

<sup>24</sup> Emon and Hasan, *Under Layered Suspicion*.

<sup>25</sup> See, for example, Mark Carney, “It’s time to end the sedition in Ottawa,” *The Globe and Mail*, 8 February 2022, A13.

<sup>26</sup> Mike Hager and Ian Bailey, “Ottawa mayor declares state of emergency over protests,” *The Globe and Mail*, 7 February 2022, A1

<sup>27</sup> Tom Cardoso, “Convoy organizers have raised nearly \$10-million, leaked data show,” *The Globe and Mail*, 15 February 2022, A3.

<sup>28</sup> Inclusion of crowd funding in PCMLTFA regulation SOR/2002-184 occurred in the regulations in force after April 2022. Compare for instance the June 1, 2021-April 4, 2022 version of the regulation (stable link: <https://canlii.ca/t/553hx>), which does not include definitions of crowd funding to the April 5-June 28, 2022 (stable link: <https://canlii.ca/t/55dpp>), and the most up to date version (<https://canlii.ca/t/55h7z>), which include definitions of crowd funding platforms for regulatory purposes.

**Table: NIRA 2023’s Terrorist Financing Threat Groups of Actors<sup>29</sup>**

Al Qaeda in the Arabian Peninsula	Extremist groups supporting violent means to establish an independent state within India
Al Qaeda Core	Foreign fighters
Al Qaeda in the Islamic Maghreb	Hamas
Al Shabaab	Hayat Tahrir Al-Sham
Aryan Strike Force (ASF)	Hizballah
Atomwaffen Division	Islamic State in Iraq and the Levant (ISIL)
The Base	Russian Imperial Movement
Blood and Honour (B&H)	Three Percenters
Combat 18 (C18)	Proud Boys

The table now includes white supremacist groups, or what NIRA 2023 calls “ideologically motivated violent extremism” (IMVE) groups.<sup>30</sup> NIRA 2023 claims that IMVE groups tend to use crowdfunding platforms to support their activities.

Despite the different threat assessments, both NIRA 2015 and NIRA 2023 center on an “inherent” risk assessment methodology; using that methodology, they assess the vulnerability of various sectors of Canada’s economy. In the NIRA Working Group’s consultation with Finance Canada officials, discussion focused on the exclusive reliance on *inherent risk* as a mode of analysis for purposes of informing reporting entities of the risk environment. Finance Canada officials insisted that inherent risk analysis is a standard international practice. It is not designed to determine where the gaps are with respect to mitigation.

The Working Group is deeply concerned that resorting to “inherent risk” alone—for purposes of publication and communication with reporting entities under the PCMLTFA—creates the potential for false positives given that mitigation measures on terrorism financing have evolved since 2001 when FATF issued its recommendations on terrorism financing. Continued reliance on inherent risk precludes consideration of risk management techniques, technologies, and strategies that have evolved over the last 25 years. Such developments include amendments and regulations to the *Proceeds of Crime Act*, the legislative creation of the CRA’s RAD, continued budgetary allocation to combat terrorism financing in the charitable sector, intelligence sharing across government departments and between states. Industries have created whole compliance offices and departments, to comply with PCMLTFA regulations. Third party vendors develop software for businesses to support compliance (e.g., ComplyAdvantage, Persona, FinScan), and professional associations like the Canadian Anti-Money Laundering Institute (CAMLI) teach future compliance officers best practices for regulatory compliance. The private sector has evolved over decades, with considerable sums of money spent each year to support compliance. Yet the Government of Canada insists on adopting a risk assessment methodology that pays little regard to the operational reality of reporting entities and others subject to scrutiny.

<sup>29</sup> NIRA 2023, 30.

<sup>30</sup> NIRA 2023, 28.

The NIRA Working Group is deeply concerned that the current methodology overdetermines the vulnerability of the charitable sector, and thereby (unfairly) erodes public confidence and trust in charities in Canada. The United Nations' global study on the impact of anti-terrorism regimes on civic space expresses alarm that states around the world are abusing the core freedoms of speech, assembly, and organization in the name of combatting terrorism. As the UN's report advises,

Civil society experiences complex and compounding misuse of counter-terrorism and P/CVE measures and practices, with connection to an ever-growing counter-terrorism, P/CVE, and security architecture and the expansion of related criminalization into the pre-criminal space. Most Global Study respondents do not experience singular direct or indirect counter-terrorism or P/CVE measures in isolation.<sup>31</sup>

One way to control for the negative implications of Canada's risk-based model is to incorporate residual risk alongside inherent risk. Residual risk stands in contrast to "inherent risk". Residual risk refers to the risk that remains *after* accounting for the controls and mitigating measures in place to inhibit money laundering and terrorism financing. Residual risk offers an empirically grounded assessment of threats and vulnerabilities, providing greater insight to reporting entities on where actual vulnerabilities, threats, and risk lie.

The NIRA Working Group questioned why Finance Canada remains wedded to inherent risk in publishing the NIRA when residual risk models would give a more accurate picture of the risk environment facing Canada's reporting entities. Publishing a residual risk assessment would enable reporting entities to better calibrate their activities to maximize both compliance and economic performance. Finance Canada's response was that publishing a residual risk analysis would effectively provide bad actors insight on Canada's economic system, making it easier for them to exploit weaknesses in the system. Moreover, they expressed criticism of the way other regimes undertake residual risk analysis. For the Working Group, publishing an inherent+residual risk analysis would promote democratic accountability; accord with growing international practice, including FATF guidance; and better support the private sector (including charities) to target and remedy identified vulnerabilities.

#### A. Democratic Accountability to the Charitable Sector Demands an Inherent+Residual Risk Analysis

Charities constitute a vital part of Canada's civil society fabric. Civil society is an essential feature of vibrant democracies. Indeed, political scientists and historians of civil society note the correlation between civil societies and democracy. As people become less connected to one another, their interest in and capacity to participate in democratic life begins to falter. In contrast, charities play a significant role in bringing people together, and creating the conditions

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<sup>31</sup> United Nations, *Global Study on the Impact of Counter-Terrorism on Civil Society & Civic Space*, 11. For the full report and ongoing discussions by the relevant UN working groups and rapporteurs, visit online: <https://defendcivicspace.com/>

for their public participation. From religious organizations to social service ones, charities bring people together to support one another, their community and their larger society. As Global Affairs Canada explains, civil society organizations (CSOs) such as charities

create a crucial link between citizens and their elected governments. CSOs play an essential role in democracies. They hold governments accountable for improved and inclusive service delivery, increase the transparency and accessibility of public and political processes, and encourage greater public and political participation, especially of vulnerable and marginalized groups. They also strengthen inclusive and gender-responsive governance, and promote peaceful pluralism and democracy. Canada commits to fostering an enabling environment for civil society.<sup>32</sup>

Given the essential function charities play in promoting democracy, NIRA 2023 raises serious democratic accountability concerns. These concerns stem in large part from the multilateral pedigree of Canada's anti-terrorism financing regime. The current anti-terrorism financing regime on charities is designed to comply with FATF recommendations on anti-terrorism, which came into existence one month after the tragic events of 11 September 2001. The FATF added to its existing anti-money laundering recommendations eight special recommendations to combat terrorism financing. The eighth special recommendation was directly aimed at charities, claiming that across all jurisdictions, charities pose a vulnerability to terrorism financing. Though the recommendations have since been restructured, and new interpretive notes have been issued across the board, the FATF's recommendation about charities remains in effect.

Canada has been a member of the FATF since its founding in 1989. The FATF's Recommendations are not a convention or a treaty that Canada has ratified and implemented within its domestic legislation. Nevertheless, the NIRA Working Group notes that these Recommendations have coercive effect across 13 Ministries, Departments, and Agencies in Canada. States such as Canada are subject to periodic review of their compliance with these guidelines through a process called a Mutual Evaluation. Countries that do not perform adequately in these peer reviews are put on lists that announce to the world that these underperforming jurisdictions are not secure from money-laundering and terrorism financing threats. No country wants to be on these lists; the lists are bad for a country's economic reputation as a destination for foreign investment, for instance.

Under international law, when Canada joins a convention or a treaty, the Government of Canada will ratify or sign the convention or treaty. But the treaty/convention does not become law in Canada until it is incorporated within our legal system. Incorporation occurs when a legislative body with appropriate jurisdiction under the Constitution formally integrates the international convention into the relevant area of law. In some cases, the treaty or convention speaks to federal matters under s. 91 of the Constitution, in which case the Federal Parliament must enact

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<sup>32</sup> Global Affairs Canada, "How Canada advances democracy in the world," online: [https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/advancing\\_democracy-avancer\\_democratie.aspx?lang=eng#a1](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/advancing_democracy-avancer_democratie.aspx?lang=eng#a1)

new legislation or harmonize older legislation to accord with the international obligation. In other cases, the convention or treaty may address matters that fall to the provinces under s. 92 of the Constitution. Each provincial legislative assembly will need to enact new or harmonizing legislation to ensure the international obligation becomes part of the Canadian legal landscape. If no such legislation implements the international treaty, the treaty is not law. No government, whether minority or majority, can turn an international treaty into law merely by signing or ratifying it with the relevant multilateral body. The legislative process is essential for ensuring that all law is subject to a democratically representative process where Canada's elected representatives nationwide perform their role in speaking on behalf of their respective ridings about new laws that will obligate Canadians.

This domestic democratic process did not happen with the FATF recommendations. Certainly, they exist alongside other conventions, such as the *Terrorism Financing Convention* and UN Security Council resolutions. But the FATF issued its Recommendations without the formalities of a convention or treaty that would require incorporation through a legislative process. While Parliament certainly added new legislation through the *Proceeds of Crime Act*, the FATF's Recommendations exist alongside these legislative enactments. As legal scholars have explained, the FATF recommendations constitute a type of "soft law":

The Recommendations are nonbinding (or 'soft law') and while they do not refer to legally binding obligations, they are recognized as requiring a political commitment to adopt a common approach to prevent the support of terrorist activities by financial institutions from the UN and FATF members. FATF Recommendations are not precise; rather they put forward a combination of precise and broad norms for implementation. They do not delegate authority to interpret or implement the law, although they do enjoy enforcement in the way of Mutual Evaluation Reports (MER) and follow-up procedures, which no government or regulated sector can shirk, in addition to sanctions for non-compliance in the form of blacklisting and economic sanctions.<sup>33</sup>

The NIRA Working Group expresses concern that the operationalization of these Recommendations is shrouded behind a bureaucracy that is unelected, and thereby not subject to the ordinary course of government checks and balances within democracies. Writing about Australia's compliance with the FATF Recommendations, Goldbarsht raises concerns that soft law norms "generated within intergovernmental forums are not subject to the checks and balances" of formal Parliamentary or legislative assembly law-making processes. "As a result, soft law regulation can serve as an 'indirect means of pushing international policies unlikely to win direct approval through the regular domestic political process.'"<sup>34</sup>

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<sup>33</sup> Doron Goldbarsht, "Who's the Legislator Anyway? How the FATF's Global Norms Reshape Australian Counter Terrorist Financing Laws," *Federal Law Review* 45, no 1 (2017): 127-151, 129.

<sup>34</sup> Goldbarsht, "Who's the Legislator Anyway?" 130, quoting Ben Hayes, Counter-Terrorism, 'Policy Laundering,' and the FATF (Transnational Institute/Statewatch, 2011), 11



The NIRA Working Group recognizes that Canada has long played an important role in global organizations to maximize cooperation on issues of multilateral concern. Its role on the FATF is no exception. While we recognize the importance of fostering ongoing global cooperation to combat money laundering and terrorism financing, the NIRA Working Group also recognizes that compliance with multilateral soft law bypasses the checks and balances that are hallmarks of Canada’s democratically representative system of government. For this reason, the NIRA Working Group believes that *how* the Government of Canada ensures compliance with FATF Recommendations—i.e., its methodology of risk assessment—must integrate the necessary checks and balances to ensure effective democratic accountability.

The current reliance on inherent risk as the sole method for disclosure to the public is far too abstracted from empirical reality to be accountable to our democratic society. The mitigation measures adopted by the Government of Canada, especially when created in accordance with soft law regimes, are part of the risk-matrix that informs how reporting entities and charities can best comply with the AML/AFT regime. To preclude these mitigation measures from any analysis of the current state of vulnerability does a disservice to Canada’s citizens and sectors, such as the charities sector, that largely seek to be compliant. Moreover, the insistence on using “inherent risk” runs contrary to the core principles of democratic accountability, especially when the government’s own mitigation and controls are created out of executive deference to soft law Recommendations that are not subject to the normal checks and balances of democratic governance.

We appreciate that Finance Canada may need to develop a methodology for assessing residual risk in light of its criticisms of how such residual risk assessments are done globally. But that methodological concern is separate and distinct from the democratic accountability concern that the NIRA Working Group has about continued reliance on “inherent risk” as a methodology. Publishing an inherent + residual risk analysis serves important democratic accountability purposes that the current approach fails to achieve.

#### B. Inherent+Residual Risk Analysis is Consistent with FATF Guidance and International Best Practices

In addition to respecting Canada’s commitment to democratic representativeness, the NIRA Working Group also believes that the inherent + residual risk analysis model reflects growing international best practices. The NIRA Working Group undertook independent research into FATF guidance on developing a national risk assessment, as well as comparative analysis of other countries’ national risk assessment documents. We could find no FATF guidance that insists inherent risk alone is the preferred approach for compliance with Recommendation 1. Moreover, we consulted experts at the Global NPO Coalition on the FATF, who have specific expertise in European and US compliance regimes. Coalition experts reviewed Canada’s 2023 NIRA and expressed shock at its singular reliance on “inherent risk”, noting that this approach does not reflect evolving global practice. In short, FATF’s ambiguity on this matter, coupled with growing international practice toward inherent + residual risk analysis suggests Canada is behind the curve of global compliance best practices.

The FATF explains that national risk assessments are designed to help a country understand the ML/TF risks it faces.<sup>35</sup> While the FATF does not prescribe the method a country should utilize, its most recent guidance does not use the phrase “inherent risk” or define it; indeed, the word “inherent” only appears once in the entire document as an adjective when it describes ML/TF risks as “inherently difficult to describe or measure in quantifiable or numerical terms.”<sup>36</sup> Elsewhere, however, the FATF’s sector-specific guidance emphasizes the salience of “inherent risk”. For instance, in its guidance on the banking sector, the FATF advises:

For individual banks, supervisors should take into account the level of *inherent risk* including the nature and complexity of the bank’s products and services, their size, business model, corporate governance arrangements, financial and accounting information, delivery channels, customer profiles, geographic locations and countries of operation. Supervisors should also look at the controls in place, including the quality of the risk management policy, the function of the internal oversight functions, etc.<sup>37</sup>

Notably, in the FATF specific guidance on terrorism financing risk assessment, the language of “inherent risk” is dropped. In its 2019 guidance, the FATF recognizes that the assessment of terrorist financing vulnerabilities is “inherently linked to a jurisdiction’s context and identified TF threats.”<sup>38</sup> The only other instance in which the word “inherent” appears is when the FATF refers to Malaysia’s 2013 and 2017 national terrorist financing risk assessments; but the example itself illustrates the limits of “inherent” risk as a method of risk assessment. Malaysia’s 2013 risk assessment found an increased inherent risk due to increased threats.<sup>39</sup> When Malaysia issued its 2017 risk assessment, it published an inherent+residual risk analysis, or what it calls “Net Risk after considering effectiveness of control measures— to assess the overall risk of terrorism financing and money laundering.”<sup>40</sup> The FATF’s guidance neither explains nor comments on Malaysia’s evolved risk assessment methodology.

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<sup>35</sup> FATF, *National Money Laundering and Terrorist Financing Risk Assessment*, 10.

<sup>36</sup> FATF, *National Money Laundering and Terrorist Financing Risk Assessment*, 26. This inherent difficulty of measurement is further reason why care and consideration should be exercised in developing a robust method of risk assessment where compliance to soft law standards is able to avoid the normal checks and balances of democratic representative governance.

<sup>37</sup> FATF, *Guidance for a Risk-Based Approach: The Banking Sector* (FATF: October 2014), 13 (emphasis added). Offering the example of the Netherlands, the FATF reports that the Dutch Central Bank (DNB) surveys selected institutions to “gain insight in the *inherent risk* level and control measures in place.” It goes on to outline the factors DNB uses to measure inherent risk: geographical scope, customer base, products and services, and the institution’s distribution channel. FATF, *Guidance for a Risk-Based Approach: The Banking Sector*, 29 (emphasis added).

<sup>38</sup> FATF, *Terrorist Financing Risk Assessment Guidance* (FATF: July 2019), 24.

<sup>39</sup> FATF, *Terrorist Financing Risk Assessment Guidance*, 32

<sup>40</sup> Bank Negara Malaysia, *National Money Laundering (ML) & Terrorism Financing (TF) Risk Assessment (NRA)* (Bank Negara Malaysia, 2017), 4, available online:

[https://amlcft.bnm.gov.my/documents/6312201/6322333/Malaysia\\_NRA2017.pdf/883f78c9-5f8a-ae6a-018d-66a60e68db7d?t=1646234127453](https://amlcft.bnm.gov.my/documents/6312201/6322333/Malaysia_NRA2017.pdf/883f78c9-5f8a-ae6a-018d-66a60e68db7d?t=1646234127453)

Other countries publicly publish national risk assessments that also exceed Canada’s singular reliance on inherent risk.<sup>41</sup>

- For instance, Chile calculates risk (*riesgo*) by reference to threat (*amenaza*), vulnerability (*vulnerabilidad*), mitigating factors (*mitigantes*), and potential impact or consequence (*impacto*).<sup>42</sup> Introducing mitigating factors serves as a check against the tendency of “inherent risk” to deliver abstracted, decontextualized assessments.
- Luxembourg’s 2023 National Risk Assessment adopts a two-step process of risk assessment. “As a first step, the **inherent risk** assessment is performed by analyzing threats in Luxembourg (i.e., relative exposure to predicate offenses and assessments of threat levels to ML/TF), and vulnerabilities (i.e., sectors’ inherent vulnerability for abuse for ML/TF). As a second step, mitigating factors and their effect on inherent risk reduction are assessed, resulting in a **residual risk** level.”<sup>43</sup> After integrating both forms of risk assessment, the Government of Luxembourg presents its AML/AFT vulnerability ratings publicly, in compliance with FATF Recommendation 1.<sup>44</sup>
- Switzerland’s 2015 national risk assessment, like so many others, defines risk by reference to threats and vulnerabilities. But Switzerland goes further and distinguishes between potential or abstract threats and real threats, the latter being the “set of threats

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<sup>41</sup> The United States does not combine its money laundering and terrorism financing assessments. It applies distinct approaches to each offense. In its money laundering assessment, it references “inherent” vulnerabilities, but its methodology focuses on “residual risk”. “Residual risk is a function of threat and vulnerability and represents an overarching judgment, taking into consideration the effect of mitigating measures including regulation, supervision, and enforcement among other things.” Department of the Treasury, *National Money Laundering Risk Assessment* (US Treasury: February 2022), 31. Its analysis of money laundering refers to inherent risk when it addresses the “vulnerabilities that are *inherent* in the credit process”; how money orders are not “*inherently* suspicious in nature”; and emphasizes the inherent qualities of art, the high-value art market, and art market participants. Department of the Treasury, *National Money Laundering Risk Assessment*, 12, 33, 62 But in its assessment of terrorist financing risk, the US assessment makes no mention of “inherent risk”. The term “inherent” occurs only once by reference to correspondent banking relationships and the processes required to “manage the risks inherent with these relationships.” Department of the Treasury, *National Terrorist Financing Risk Assessment* (US Department of the Treasury: 2022), 16 n 90. Instead, the US assessment repeatedly emphasizes “potential” risk, which seems to refer to probability rather than the abstract idea of “inherent”. As the report explains, “[r]isk is a function of threat, vulnerability, and consequence”: a threat “with the potential to cause harm”. Risk presents a vulnerability that “can be exploited to facilitate terrorism financing”, whether because of a “specific financial product...or a weakness in regulation, supervision, or enforcement”; and a consequence capturing the “impact or harm” that terrorism financing may cause. Department of the Treasury, *National Terrorist Financing Risk Assessment*, 3. The analysis of vulnerability is much more particular than one finds in Canada’s use of “inherent” risk analysis.

<sup>42</sup> Government of Chile, *Estrategia Nacional Para Prevenir y Combatir el Lavado de Activos y el Financiamiento del Terrorismo 2018-2020* (Unidad de Análisis Financiero: 2018): 14. See also, Unidad de Análisis Financiero, *Evaluación Nacional de Riesgos de LA/FT* (UAF: 2017), 7. Both documents are available online: <https://www.uaf.cl/estrategia/estrategia2018-2020.aspx>

<sup>43</sup> Ministry of Justice, *National Risk Assessment of Money Laundering and Terrorist Financing* (15 September 2020) 22 (bolding in original). Online: <https://mj.gouvernement.lu/dam-assets/dossiers/blanchiment/en-nra-import-version-2982022.pdf> (accessed 19 October 2023),

<sup>44</sup> As noted in the 2023 evaluation of Luxembourg, “mitigating measures [of inherent risk] play a key role in driving the ultimate determination of residual risk.” FATF, *Luxembourg: Anti-money laundering and counter-terrorist financing measures- Mutual Evaluation report* (September 2023), 36 online

that materialize and that can, in principle, be measured.”<sup>45</sup> It also distinguishes between general vulnerabilities and specific vulnerabilities. The former are those “inherent in the structural characteristics of the country and its financial centre”; specific vulnerabilities are those “linked to the practices and instruments used in a certain area of activity.”<sup>46</sup> The Swiss report combines both qualitative and quantitative data with the “aim of perceiving the risks as realistically as possible.”<sup>47</sup>

These other models stand in contrast to Canada’s sole reliance on inherent risk for purposes of publishing its National Risk Assessment. Other countries evaluate the threats, vulnerabilities, and consequences posed to their economic system by integrating both the abstraction of inherent risk, and the more empirically based model of mitigation analysis. The result is a refined appreciation of risk, which is then communicated publicly to generate private sector engagement and compliance. As the various sectors of the economy evolve over time to manage and contain money laundering and terrorist financing threats, we should expect that risk calculations will change industry-to-industry, sector-to-sector. That change would be reflected in a residual risk model, which may start with the abstraction of inherent risk, but then ground that imagined, decontextualized vulnerability with the empirical data of how reporting entities have and continue to address AML/AFT risk.

The NIRA Working Group finds that numerous countries adopt a residual risk assessment model for purposes of publication, which in turn provides a more empirically grounded assessment of risk, targets those sectors most vulnerable, and acknowledges the strides taken by the private sector in insuring against such risks. A residual risk assessment would be a more effective tool to identify risks; it would also be more democratically responsive to the reality of Canadian organizational compliance. Rather than informing bad actors, the publication dissuades bad actors by indicating how inhospitable the private sector is to abuse. Moreover, by being more reflective of private sector mitigation efforts, the private sector may better balance compliance with economic efficiency, contributing to more robust economic performance indicators.

Given the soft law nature of FATF Recommendations and Canada’s compliance regime, the NIRA Working Group considers inherent+residual risk assessment to serve as a methodological check on a compliance regime that is otherwise immune from the formal checks and balances of our democratic government. It provides an accounting of the soft law-inspired governmental controls on the private sector, as well as the actual contributions the private sector makes to fight against money laundering and terrorism financing.

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<sup>45</sup> Confederation of Switzerland, *Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland* (Swiss Confederation, 2015), 12, available online: <https://www.fatf-gafi.org/en/publications/Methodsand Trends/ML-tf-risks.html>

<sup>46</sup> Confederation of Switzerland, *Report on the national evaluation*, 12.

<sup>47</sup> Confederation of Switzerland, *Report on the national evaluation*, 13. Incidentally, the FATF’s 2016 Mutual Evaluation of Switzerland reported that the Swiss authorities “have a good understanding of the risks of ML/TF”. FATF, *Switzerland: Anti-money laundering and counter-terrorist financing measures—Mutual Evaluation Report* (FATF: December 2016), 3.

For this reason, the NIRA Working Group issues the following Recommendation:

*Recommendation 1: The ACCS advises the Minister of National Revenue and Commissioner of the CRA to strongly advocate that the Ministry of Finance evaluate the charitable sector’s vulnerability using a combination of inherent and residual risk analysis. The current approach of only publishing an inherent risk assessment runs contrary to growing international practice and indulges in an abstracted notion of risk devoid of regulatory and compliance context. This methodology is not informative of the actual risk environment facing the charitable sector, and overdetermines the vulnerability of Canada’s charitable sector. This undermines public confidence in the sector, in particular with reporting entities under the PCMLTFA. This shift in methodology would make Canada’s approach consistent with evolving international standards and remain consistent with FATF guidelines.*

#### IV. The NIRA should offer guidance on *Charter* and GBA+ Compliance

##### A. NIRA’s silence on *Charter*-compliance Enables Unintended Consequences to Remain Unchecked

The NIRA Working Group had the opportunity to discuss with officials from the Ministry of Finance how they develop the NIRA and its role in the Government. Officials explained that thirteen (13) government departments and agencies play an active role in developing the NIRA.<sup>48</sup> Together, they identify threat actors and vulnerable sectors in Canada with respect to both money laundering and terrorism financing. Finance Canada officials stressed that the information in the NIRA is a summary of intelligence gathered from various stakeholders. Importantly, the NIRA offers a cataloging of how different departments and agencies operationalize their obligations under the AML/AFT regime. Finance Canada officials were careful to explain that the NIRA is not meant to dictate how any department or agency acts; rather it is a tool that any unit within the government can use to augment existing intelligence and policy work and calibrate (or not) their operational measures and procedures.

Publishing the NIRA is not only meant to serve FATF compliance purposes. Finance Canada officials explained that the NIRA is intended to be a public facing document that private sector businesses (and charities) can use as a tool to assess their own compliance measures subject to FINTRAC guidance and regulatory oversight.

Given the charity sector’s public debates on audits, the NIRA Working Group expressed concern that the NIRA does not summarize or strategize how departments or agencies ensure their

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<sup>48</sup> NIRA 2023, 4. Both the CRA and Global Affairs Canada are among the thirteen participating government departments and agencies. The consultation meeting with Global Affairs Canada officials did not result in any insight on how Global Affairs Canada engages with the Ministry of Finance in developing the NIRA. The GAC officials consulted were focused principally on implementing the now passed Bill C41 on the humanitarian exception to the Criminal Code and developing the application process to certify development assistance in otherwise high-risk jurisdictions.

AML/AFT compliance mechanisms are also compliant with the *Charter*. The Working Group appreciated the imperative to comply with FATF Recommendations. But, given that FATF Recommendations are soft law bypasses around formal checks and balances in our democratic system, the Working Group also noted the constitutional obligation to abide by the *Charter*.

When asked about the absence of *Charter* compliance in the NIRA, Finance Canada representatives said that it is not their responsibility to dictate or recommend through the NIRA how other agencies undertake and implement *Charter* protections in their local operations. NIRA is not a document that purports to tell any Department or Agency how to structure its AML/AFT compliance. Similarly, the NIRA is not the appropriate vehicle to advise Departments or Agencies on their *Charter* obligations as they implement AML/AFT regulatory regimes. As they explained, responsibility for *Charter* compliance occurs at the department or agency level.

The Working Group appreciated Finance Canada's approach to the NIRA and jurisdictional restraint on how other departments or agencies implement *Charter* protections. But when the Working Group began asking different departments or agencies how they institutionalize *Charter* compliance when fulfilling their AML/AFT regulatory role, little insight was provided. For example, the Working Group consulted RAD officials to better understand their function. RAD's principal role within the CRA is to support Canada's counter-terrorism efforts, and specifically to protect the charitable sector from terrorist financing.<sup>49</sup> RAD's role is administrative, not criminal. RAD neither confirms nor validates that terrorism financing has occurred in fact. Rather its mandate, under the anti-terrorism financing regime, is to ensure public confidence in the charitable sector.

RAD officials explained that charities are selected for audit for a variety of reasons, such as reviews of their T3010 forms; follow up from prior compliance agreements; internal referrals; complaints from the public; or information from national security partners. RAD officials explained they do not select charities for audit based on faith or religion, nor does the CRA maintain data on the denomination of charities or applicants.<sup>50</sup>

The Working Group asked RAD officials how they implement checks and balances to ensure compliance with the *Charter*. RAD officials explained that their approach is defined in terms of risk and risk assessment: their mandate is to respond to the *facts* of risk as framed by the NIRA and in coordination with partners across the government. The emphasis on risk is certainly consistent with FATF recommendations on AML/AFT regulatory oversight. But it is not a

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<sup>49</sup> Neither the FATF, NIRA 2015, nor NIRA 2023 consider charities vulnerable to money laundering; rather they are deemed vulnerable to terrorism financing.

<sup>50</sup> The Working Group learned, on the contrary, that denominational data is available through the CRA. Charity Data ([www.charitydata.ca](http://www.charitydata.ca)), which is a resource produced by a leading law firm specialized in charity law using publicly available CRA data, permits an advance search function whereby users can identify charities that advance religion, broken down by religious tradition and sect/denomination. As the site explains, "Charitydata.ca search uses the last complete dataset from CRA of registered charities, which is now 2021." See [www.charitydata.ca](http://www.charitydata.ca), select advanced search function, and scroll under category to 'advancement of religion'.

response to the question about institutionalizing *Charter* compliance in the pursuit of AML/AFT regulation.

The discussion with Finance and RAD officials was helpful to understand the audit process of charities under Canada’s anti-terrorism financing regime. At the same time, the consultations with both offices skirted the real-time, public discussion in the charitable sector and in the Senate<sup>51</sup> about the anti-terrorism financing regime, the vulnerability of charities, and the audits of Muslim-led charities. In short, it was difficult to broach a discussion about how to control for bias.

The Working Group appreciates that these are difficult questions to address, let alone in the context of litigation. At the same time, to ensure public confidence in the charitable sector (which includes trust in the charities regulator), these questions cannot be skirted. The Senate Committee on Human Rights found that “it is clear that RAD’s work to date—regardless of the intentions of its employees—has demonstrated structural bias against Muslim charities.”<sup>52</sup>

This finding falls within the ambit of what the FATF is now examining as the “unintended consequences” of its Recommendations. As the FATF reported in October 2021, the unintended consequences of its recommendations have led to an increase in reporting entities de-risking whole sectors of the market, financial exclusion out of an abundance of risk-assessed caution, undue targeting of charities and not-for-profits, and a curtailment of human rights, with a focus on due process and procedural rights. The FATF has gone so far as to acknowledge that

there has been an inconsistent consideration of due process and procedural rights in the mutual evaluations [MER] conducted to date...The topic of possible infringements or abuses and their link to the FATF Standards has been largely omitted from MERs, even in cases when concerns about such issues have been widely reported by credible and reliable sources.<sup>53</sup>

Sharing the Senate’s concern, and aware of the FATF’s recognition of the unintended consequences of its recommendations, the NIRA Working Group recommends the following:

*Recommendation 2: The ACCS recommends to the Minister of National Revenue and the Commissioner of the CRA to strongly advocate that the Ministry of Finance, in its next revision of*

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<sup>51</sup> For instance, the ICLMG report, *The CRA’s Prejudiced Audits*, claimed that 75% of all charities revoked by RAD between 2008-2015 were Muslim-led charities. That figure was confirmed by the CRA’s Geoff Trueman in testimony before the Senate. Geoff Trueman before the Standing Senate Committee on Human Rights, 44<sup>th</sup> Parliament, 1<sup>st</sup> Session (November 22, 2021-Present), November 28, 2022. Online:

<https://sencanada.ca/en/Content/Sen/Committee/441/RIDR/27EV-55857-E>.

<sup>52</sup> Standing Senate Committee on Human Rights, *Combating Hate: Islamophobia and Its Impact on Muslims in Canada*, November 2023, 51. Online: <https://sencanada.ca/en/info-page/parl-44-1/ridr-islamophobia/>

<sup>53</sup> FATF, “High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards,” 27 October 2021, online: <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Unintended-Consequences.pdf.coredownload.pdf> (accessed 26 January 2024).

*the NIRA for publication, develop and publish guidance to the 13 participating Departments and Agencies on how they may both fulfill their AML/AFT regulatory role and maintain compliance with the Charter of Rights and Freedoms. Developing and publishing such guidance will also signal to PCMLTFA reporting entities to consider their obligations under relevant provincial and federal human rights codes, thereby controlling for unintended consequences of AML/AFT compliance requirements.*

## B. The NIRA's Silence on GBA+ Enables Unintended Consequences on Muslim-identified Charities to Remain Unchecked

At the April 2023 in-person meeting of the ACCS in Toronto, members were introduced to the Government of Canada's equity policy, called Gender-Based Analysis Plus (GBA+). Women and Gender Equality Canada (WAGE) describes GBA+ as follows:

GBA Plus is an analytical process that provides a rigorous method for the assessment of systemic inequalities, as well to assess how diverse groups of women, men, and gender diverse people may experience policies, programs, and initiatives. The "plus" in GBA Plus acknowledges that GBA Plus is not just about differences between biological (sexes) and socio-cultural (genders). We all have multiple characteristics that intersect and contribute to who we are. GBA Plus considers many other identity factors such as race, ethnicity, religion, age, and mental or physical disability, and how the interaction between these factors influences the way we might experience government policies and initiatives.<sup>54</sup>

GBA+ has been criticized for centering sex and gender while marginalizing other indicia of identity by collapsing them all into a single sign (+). Others who may take the + seriously consider GBA+ a plausible way of integrating more recent approaches, such as Kimberlé Crenshaw's intersectional model of analysis.<sup>55</sup>

We do not take a position on the merits or limitations of GBA+. We simply note that the analysis below proceeds in the spirit of the WAGE definition of GBA+ as an analytic method. Consultations with Finance Canada noted that the NIRA is not designed or intended to dictate how any agency or department applies GBA+ methodologies when fulfilling AML/AFT regulatory roles. Moreover, the consultations with RAD officials revealed that it cannot address how it integrates systemic protections against bias or prejudice within its risk assessment methodologies.

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<sup>54</sup> WAGE, "What is Gender-based Analysis Plus", accessed 18 June 2023: <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html>

<sup>55</sup> Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1989, no 1, Article 8. Available at: <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>. For a general review of GBA+, see Olena Hankivsky and Linda Mussell, "Gender Based Analysis Plus in Canada: Problems and Possibilities of Integrating Intersectionality," *Canadian Public Policy* 44, no 4 (2018): 303-316.



To illustrate why GBA+ is an important factor to expressly integrate within the NIRA, the Working Group provides an analysis of NIRA 2023 by centering charities and GBA+ as analytic standpoints. The analysis reveals that embedded in the NIRA are certain methodological conditions that overdetermine the Muslim-led charitable sector as risk-laden. To put it in terms of the WAGE definition, the analysis below will show how “the interaction between these factors [charity and Muslim identity] influences the way [Muslim-led charities] might experience” NIRA 2023.

i. **NIRA Creates a Presumptive Nexus between Muslim-Identified Charities and Terrorism Financing**

As noted above, the 2015 NIRA identified 100% of inherent risk of terrorist financing with groups that map onto Canada’s racial and religious minorities; over 80% of that inherent risk of terrorist financing mapped directly onto Canada’s Muslim communities. The 2023 NIRA revised the distribution of risk. NIRA 2023 included in its list of threat actors several White supremacist groups, which it labels Ideologically Motivated Violent Extremists (IMVE). The table of “terrorist financing threat groups of actors” now reads as follows:

**NIRA 2023 Terrorist Financing Threat Groups**

Al Qaeda in the Arabian Peninsula	Extremist groups supporting violent means to establish an independent state within India
Al Qaeda Core	Foreign Fighters
Al Qaeda in the Islamic Maghreb	Hamas
Al Shabaab	Hayat Tahrir Al-Sham
Aryan Strike Force (ASF)	Hizballah
Atomwaffen Division	Islamic State in Iraq and the Levant (ISIL)
The Base	Russian Imperial Movement
Blood & Honour (B&H)	Three Percenters
Combat 18 (C18)	Proud Boys

Of the 18 entries, “foreign fighters” is a difficult one to assess because it requires reviewing the Terrorist Entities List. That list identifies groups that are disproportionately Muslim-identified, with small increases in recent years of IMVE groups. Removing foreign fighters from our calculation, the table breaks down the 17 remaining groups as follows:

Group Identification	Number	Percentage Representation
IMVE	8	47%
Muslim-identified	8	47%
Other	1	6%

From this table, it appears that approximately 53% of inherent terrorist financing risk maps onto Canada’s racial and religious minorities, while 47% maps directly onto Canada’s Muslim communities. This is certainly a change from the 2015 NIRA.

However, when we cross tabulate this table with threat actors most likely to use charities to raise funds, little of the story remains changed from 2015. The 2023 NIRA is clear that “organized IMVE groups in Canada use both personal and business accounts to conduct their financial activities...Using personal accounts, organized groups largely relied on electronic money transfers and cash deposits for their fundraising activities.”<sup>56</sup> Canadians who support international IMVE groups may also use money service businesses and other payment processing companies. But nowhere does NIRA 2023 suggest that IMVE’s use charities to raise funds.

According to NIRA 2023, the only threat groups that use charities also happen to map exclusively onto Canada’s Muslim population. NIRA 2023 identifies the following threat actors as prone to use charities to raise funds:<sup>57</sup>

Al Qaeda Core
Al Qaeda in the Arabian Peninsula
Al Qaeda in the Islamic Maghreb
Al Shabaab
Hamas
Hizballah

In other words, while NIRA 2023 identifies 47% of inherent terrorist financing risk with groups that map onto Muslim communities in Canada, it identifies 100% of inherent terrorist financing risk *through charities* with groups that map onto Muslim communities (and thereby Muslim-led charities) in Canada. No other identifiable subset of charities is targeted in this way by NIRA 2023.

Recalling the WAGE definition of GBA+, the NIRA Working Group asked itself how Muslim-identified charities “may experience policies, programs, and initiatives,” in particular NIRA 2023’s analysis of inherent terrorist financing risk. We appreciate that the assessment of risk for terrorism and terrorism financing is meant to be a fact-based analysis of where the risk lies. But we also appreciate that there are other considerations that call for a recalibration of the NIRA. Those considerations include, but are not limited to:

- The Government of Canada’s continued use of inherent risk assessment methodology is more abstract than empirical, allowing within the method for the operation of biases.

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<sup>56</sup> NIRA 2023, 29.

<sup>57</sup> Curiously, while NIRA 2023 lists Hayat Tahrir al-Sham as a terrorist financing threat group, it offers no discussion or description of the group, nor any explanation of why it is on the list. This is the only group of the 18 listed about which NIRA 2023 is silent. For purposes of clarity and accountability, we recommend NIRA 2023 to be amended to provide relevant content and context for this group.

- The FATF’s commitment to examine and control for the unintended consequences of its Recommendations, including concerns about human rights, equality, and procedural fairness.
- The Senate’s finding of systemic bias in how RAD has audited Muslim-identified charities.
- The Ontario Superior Court’s concerns about CRA over-reach in the audit of a Muslim-led charity in Canada. Though the Ontario Superior Court did not find a *Charter* violation in the 2015 risk analysis, it also avoided addressing how that risk assessment is applied in the ordinary course of an audit, where GBA+ methodologies may be helpful to forestall bias in the ordinary course of business.

These considerations lead the NIRA Working Group to the conclusion that a GBA+ analysis, if done in the early stages of NIRA drafting and articulated within the published NIRA as guidance, will enhance the efficacy and fairness of Canada’s AML/AFT regime and control against unintended consequences arising from its current regime.

ii. [NIRA 2023’s List of High-Risk Jurisdictions Creates a Presumptive Nexus between Muslim-identified Charities and Terrorism Financing](#)

NIRA 2023 references various documents and secret intelligence concerning the locations where Canadians may send money or goods to fund terrorism. It identifies certain countries as “the most likely locations where such funds or goods would be received”:

Afghanistan, Egypt, India, Lebanon, Jordan, Qatar, Pakistan, Palestinian Territories, Somalia, Syria, Turkey, United Arab Emirates, and Yemen.<sup>58</sup>

Every country on this list either has a majority Muslim population or a sizable Muslim minority. Some of these countries are sites of conflict. Others are governed in whole or in part by groups listed on Canada’s terrorist entities list (e.g., Afghanistan’s Taliban). Others are subject to sanctions by Canadian allies (e.g., Qatar). Notably, Iran is missing from this list; but it is already covered by the Special Economic Measures Act (SEMA). NIRA 2023 explains that the selection of these countries was based on Government of Canada public reporting, US Department of the Treasury assessments, FATF reports, and “protected information and analysis by Government of Canada officials on the potential for Canadians to send money or goods abroad to fund terrorism.”<sup>59</sup>

Of course, the Government of Canada has the authority and capacity to determine where risks are greatest. At the same time, the NIRA Working Group is aware of the longstanding trope, if not stereotype, that identifies Muslim majority states as havens for terrorists and terrorist financiers. A GBA+ analysis published in the NIRA would at least allow participating Departments and Agencies to recognize how the NIRA may perpetuate that stereotype and offer guidance to Departments and Agencies on how to control for it. Moreover, publication of such guidance

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<sup>58</sup> *NIRA 2023*, 28.

<sup>59</sup> *NIRA 2023*, 28.

would signal to reporting entities under the PCMLTFA to include such considerations in their own risk assessment methodologies, thereby upholding the FATF’s commitment for controlling against unintended consequences in how its Recommendations are understood and implemented.

On the other hand, the NIRA Working Group identified an inconsistency in how NIRA 2023 utilizes geography to identify which jurisdictions pose the greatest threat of terrorism financing. NIRA 2023 lists Muslim-identified threat actors and associates them with geographies that then become listed as high-risk jurisdictions. No similar analysis in the NIRA identifies IMVE threat actors with geographic regions for purposes of red-flagging those jurisdictions with respect to terrorism financing. Even though IMVE groups are now listed as significant threat actors, there is no corresponding country or region associated with their existence, as if they operate from Nowhere.

Certainly, Canadians supporting these organizations may use their private accounts to send money to those organizations, which may have their own accounts in certain jurisdictions. But none of those jurisdictions are identified as “the most likely locations where such funds or good would be received.” The NIRA Working Group finds this silence troubling given the four considerations noted at the end of the prior section.

For example, NIRA 2023 described Atomwaffen Division as an international neo-Nazi terror group with presence in Canada, the UK, the US and Germany. The Base and Blood & Honour are neo-Nazi organizations with origins in the United States. The Russian Imperial Movement is a national group based in Russia, though with ties around the world. According to NIRA 2023, these IMVE groups secure funding through “personal and business accounts”, though the analysis reads as preliminary.<sup>60</sup> Noticeably absent in the list of high-risk jurisdictions are those that provide a base of operations for these IMVE groups.

Using NIRA 2023’s own logic about listing certain countries as high-risk jurisdictions, the NIRA Working Group is unclear why the jurisdictions where IMVE groups operate are not also listed as high-risk jurisdictions. Given that the listed high-risk jurisdictions are largely Muslim-majority states, it is reasonable that a GBA+ analysis would indicate that Canadians who come from these regions, identify with these regions, or have characteristics associated with these jurisdictions would consider the NIRA unduly targets them.

It may be that the NIRA needs to clarify the role geography and jurisdiction play in determining what is and is not a high-risk jurisdiction. This is important for Finance Canada to also comply with the FATF’s commitment to combatting the unintended consequences of its Recommendations. The problem with the current list of high-risk jurisdictions is that it creates a basis for reporting entities and third-party compliance service providers to disproportionately red-flag these regions with respect to otherwise lawful transactions Canadians wish to make. Red-flagging these regions may lead to reporting entities de-risking these areas of the world to

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<sup>60</sup> NIRA 2023, 29.

avoid risk, rather than manage or mitigate risk. But this form of de-risking can create the unintended consequence of financial exclusion. As the FATF has explained, financial institutions may engage in de-risking exercises to avoid perceived risk rather than manage risk. An example of de-risking includes the reduction of correspondent banking relationships, leading to increased costs and payments for consumers.<sup>61</sup> Moreover, “NPOs may also face delayed and higher cost transactions and some financial transactions may be more likely to take place outside the regulated financial system as a result of de-risking.”<sup>62</sup> While the FATF is studying the relationship between FATF standards and these unintended consequences, they recognize that how countries choose to comply with their standards can lead to de-risking and financial exclusion. “For example, weaknesses in a country’s regulation and supervision may contribute to decisions by financial institutions to cut off customers from that country as banks believe they cannot effectively manage the risks.”<sup>63</sup>

The NIRA Working Group consulted representatives from Cooperation Canada and the Humanitarian Coalition. Cooperation Canada has 89 member organizations committed to international development.<sup>64</sup> Humanitarian Coalition is a coordinating body of Canada’s 12 largest humanitarian relief charities. It coordinates emergency fundraising appeals to ensure efficient and effective fundraising in a time of urgent need. The Working Group considered this subset of the charitable sector particularly vulnerable to Canada’s anti-terrorism financing regime given that countries desperately in need of humanitarian and development assistance are also countries NIRA 2023 identifies as high-risk jurisdictions for terrorism financing. The two organizations shared numerous concerns with the Working Group:

- They expressed concern about how to restart operations in places like Syria, which had been on hold given Canada’s sanctions against the country.
- They relayed concerns from their members that certain banks and payment services (e.g., PayPal) were debanking certain clients to narrow their risk appetite (i.e., unintended consequences).

Finance Canada officials expressed surprise during consultations when they learned of the debanking stories shared with us. They noted that information in the NIRA should not lead reporting entities to debank sectors or subsectors of the economy. Any decision to debank a client, they said, should be based on the specific risks of the legal or natural person in question and in a manner consistent with the legal framework in the financial sector for consumer

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<sup>61</sup> Tara Rice, Goetz von Peter, and Codruta Boar, “On the global retreat of correspondent banks,” *BIS Quarterly Review* (March 2020): 37-52. Online: [https://www.bis.org/publ/qtrpdf/r\\_qt2003g.pdf](https://www.bis.org/publ/qtrpdf/r_qt2003g.pdf) (accessed 26 January 2024).

<sup>62</sup> FATF, “High-Level Synopsis,” 2.

<sup>63</sup> FATF, “High-Level Synopsis,” 2.

<sup>64</sup> At the time of the consultation, the Ministry of Finance issued an open call for submissions for its review of its money laundering and terrorism financing regime. While the consulted parties were aware of the call for submissions, they asked the Working Group for advice on how to proceed. The Working Group members, considering the ACCS mandate to support the charitable sector, volunteered to draft a submission on behalf of Cooperation Canada. That submission was filed with the Ministry of Finance and is attached to this report as Appendix A.

protection. While that may very well be true, nothing of this sort is stated in either the 2015 or 2023 NIRA.

The NIRA Working Group recognizes that the Government of Canada is fully within its mandate to identify risks of terrorism financing. The NIRA Working Group also believes that integrating GBA+ in both the development of the NIRA and in the published version for purposes of publication offers an important opportunity to control against presumptions, biases, and overreach. A published GBA+ analysis (coupled with inherent + residual risk analysis) would ensure more nuanced risk analysis that also controls against possible bias and unintended consequences arising from reporting entities seeking to be compliant.

Given the above analysis, the NIRA Working Group issues the following Recommendation:

*Recommendation 3: The ACCS recommends to the Minister of National Revenue and Commissioner of the CRA to strongly advocate that the Ministry of Finance, in its next iteration of the NIRA, involve the Ministry of WAGE to develop and provide a GBA+ analysis of the NIRA and that the published draft of the NIRA include a section offering guidance on how the 13 Departments and Agencies may integrate GBA+ in how they assess risk and perform their duties to combat terrorism financing. Publishing such guidance will also signal to PCMLTFA reporting entities that they must consider their own risk-assessment practices from this perspective, which will help control against unintended consequences of AML/AFT compliance requirements.*

## V. Systemic Checks to Support Equality and National Security: A Bill C41 Case Study

Aside from GBA+ considerations, NIRA 2023's list of high-risk jurisdictions poses a major challenge to Canada's humanitarian and development relief charities. Many of these countries are also where humanitarian and development aid are most needed. The Working Group appreciates that the national security focus of NIRA precludes robust engagement with the importance of humanitarianism. At the same time, the Working Group was surprised NIRA 2023 does not expressly address the important role Canada's humanitarian charities play globally, and the imperative to balance support of such work with national security considerations. In recent years, the FATF has expressly recognized the important humanitarian work charities perform around the world. "The FATF recognizes the vital importance of the NPO community in providing charitable services around the world, as well as the difficulty of providing assistance to those in need, often in remote regions, and applauds the efforts of the NPO community to meet such needs."<sup>65</sup> In addition, the FATF has recognized that among the unintended consequences of its recommendations is the "undue targeting of NPOs":

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<sup>65</sup> FATF, *Best Practices: Combatting the Abuse of Non-Profit Organisations (Recommendation 8)*, 4, available online: <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/BPP-combating-abuse-non-profit-organisations.pdf> (access 25 January 2024).

The constraints reported to have been applied to NPOs ... include: (1) intrusive supervision of NPOs; (2) restrictions on NPOs' access to funding and bank accounts; and (3) forced dissolution, de-registration or expulsion of NPOs. Within each of these categories are a variety of restrictions, burdens and requirements that impede the ability of NPOs to operate and pursue their missions effectively, to access resources, and in some cases, to continue their operations.<sup>66</sup>

NIRA 2023 focuses on the vulnerability of Canada's charities doing work overseas to terrorism financing. In contrast with the FATFs most recent interpretive note to Recommendation 8, NIRA 2023 does not acknowledge the contribution Canada's humanitarian and development agencies provide in difficult parts of the world. Nor does it acknowledge openly and publicly, the need for Departments, Agencies, and private sector reporting entities to ensure the continuity of these charities' work while also regulating compliance with anti-terrorism financing policy. Doing so in a manner that parallel's FATF's language would publicly signal to reporting entities under the PCMLTFA to consider their important function as they implement derisking measures to maintain their good standing under PCMLTFA regulations.

While concerned about NIRA 2023's unintended consequences on Canada's charities, the NIRA Working Group considers the Government of Canada's passage of Bill C41 to be an important systemic endeavor to balance risk with humanitarianism and to check against the abiding trope that overdetermines the "Muslim" as terrorist.<sup>67</sup> Bill C41 sought to amend the Criminal Code and make amendments to other acts. It received royal assent on June 20, 2023. The Act modified the Criminal Code to create a humanitarian and development assistance exception to the criminalization of all support for terrorism.

Specifically, the new section 83.03(4) creates an exception to criminal liability for those whose sole purpose is to carry out "humanitarian assistance activities conducted under the auspices of impartial humanitarian organizations in accordance with international law while using reasonable efforts to minimize any benefit to terrorist groups." This is what Global Affairs Canada officials termed during our consultations "the humanitarian exception". This exception is now good law and allows Canada's humanitarian relief agencies to aid high-risk jurisdictions despite the possible risk of terrorist financing. If a relief agency aims to go beyond humanitarian relief and instead provide development assistance in an area controlled by a terrorist group, it would need to apply to the Public Safety Minister for authorization to undertake any of the following:

- (a) providing or supporting the provision of health services;
- (b) providing or supporting the provision of education services;

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<sup>66</sup> FATF, "High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards," 27 October 2021, 4. Online: <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Unintended-Consequences.pdf> (accessed 25 January 2024).

<sup>67</sup> See, for example, Caroline Mala Corbin, "Terrorists are always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda," *Fordham Law Review*, 86, no. 2 (2017): 455-485.

- (c) providing or supporting the provision of programs to assist individuals in earning a livelihood;
- (d) providing or supporting the provision of programs to promote or protect human rights;
- (e) providing or supporting the provision of services related to immigration, including services related to the resettlement of individuals and the safe passage of individuals from one geographic area to another; and
- (f) supporting any operations of a federal minister or a department or agency of the Government of Canada that are conducted for a purpose other than one set out in any of paragraphs (a) to (e).<sup>68</sup>

For purposes of the act, “a terrorist group controls a geographic area if the group exerts sufficient influence over the area such that the carrying out, in the area, of an activity involving property or financial or other related services could reasonably be expected to result in the terrorist group using or benefiting from the property or services, in whole or in part.”<sup>69</sup>

As GAC officials explained, Bill C41 was a response to growing concerns about the implication of the earlier Criminal Code provisions on the work of humanitarian organizations seeking to provide services in Afghanistan after the Taliban’s takeover of the government. Pam Damoff (MP, Lib, Parliamentary Secretary to the Minister of Public Safety) explained in Parliament that the legislation “aims to address important aspects of the deepening crisis in Afghanistan and responds to Canadian humanitarian aid agencies and their pleas to be able to deliver relief to a country on the brink.”<sup>70</sup> She explained that potential Criminal Code liability has limited the ability of Canadian aid organizations to provide assistance to Afghanistan precisely because the Taliban, which took over the country, remains listed on Canada’s terrorist entities list. Senator Ratna Omidvar cogently explained the same to her Senate colleagues:

The Taliban was and is a pariah in the world. Canada listed the Taliban as a terrorist entity many years ago. Now that it is the government, Canadians are prevented by law from paying any taxes or fees to it. This has a direct impact on aid to Afghanistan because when you are delivering aid, by default you have to access services and, therefore, directly or indirectly pay fees and taxes to the government of the Taliban — which may then use it for their own terrorist purposes. By doing so, any Canadian, or Canadian organization, can be charged criminally. Canadian aid to Afghanistan through our international development agencies, including agencies like the Afghan Women’s Organization, which runs an orphanage in the Helmand region, has been blocked.<sup>71</sup>

Global Affairs Canada officials explained during our consultation that Bill C41 was meant to create a gray zone in the Criminal Code to create opportunities to provide aid to places in need

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<sup>68</sup> Criminal Code, s. 83.032(1).

<sup>69</sup> Criminal Code, s. 83.032(2).

<sup>70</sup> Pam Damoff, March 27, 2023, sitting 173. Online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-41?view=details#bill-profile-tabs>

<sup>71</sup> <https://www.parl.ca/legisinfo/en/bill/44-1/c-41?view=details#bill-profile-tabs>



of humanitarian and development support, but which were also under the control of a terrorist group, thus posing potential Criminal Code liability.

The humanitarian exception to the Criminal Code is now in place. Its emphasis is on the activities undertaken and on the urgency of the need. They explained that to receive a humanitarian exception, an organization must be carrying out urgent, lifesaving and humanitarian aid. But they recognized that though the new amendments distinguish between humanitarian aid and development assistance, the new amendments do not define the difference between these two forms of aid. Global Affairs Canada officials offered little guidance except to say that organizations working in this field will know and evolve the definition. When pressed on what they know of the sector, Global Affairs Canada officials charged with C41 mandates acknowledged they were not fully apprised of the work Canada's humanitarian and development aid sector does abroad.

The distinction between humanitarian aid and development aid is an important question of fact because C41 creates a separate mechanism for development aid, including an application requiring approval by the Minister of Public Safety. GAC officials offered the example of land mine clearing. Clearing land mines, by itself, may be developmental, and not qualify for the humanitarian exception; but clearing landmines so that victims of violence can have secure passage to a hospital may be humanitarian for purposes of the exception. Working Group members offered an additional example: providing an X-ray machine may be humanitarian assistance where no X-ray machine exists or was destroyed; but rebuilding a hospital or creating a wing for pediatric care may be development assistance. These examples, however, identify a considerable range of activity, leading to greater ambiguity than clarity in how C41's provisions will be applied.

As noted above, the NIRA Working Group met with representatives from Canada's humanitarian and development relief charitable sector. Top of mind for them and their membership was how to conduct effective relief work in Afghanistan under the newly passed Bill C41. Of concern to them is how the government will distinguish between humanitarian aid and development aid, per the legislative amendments. Though the organizations may have an idea of what the difference is, what matters to them is how Public Safety will articulate it under the regime that now exists in the Criminal Code (but which was still in operational development at the time of writing). The new legislation provides a mechanism to address this ambiguity. Section 83.032(1)(2.1) requires the Public Safety Minister, once a request has been made, to provide "in writing about whether an authorization is required to carry out an activity or a class of activities in a given geographic area." At the time of the consultation, this mechanism had not been defined or developed. At the time of writing, there is no clarity on the request process, the turnaround time for an answer from the Minister's office, or the methodological bases by which meaningful decisions will be made.

The NIRA Working Group remains concerned that limited knowledge of what the sector currently does, coupled with legislative ambiguity on humanitarian aid and development aid, will vex the charitable sector and potentially render them vulnerable to Criminal Code liability.

## A. Bill C41 and the Certification Process to Provide Development Assistance

The NIRA Working Group examined the certification process Canada's humanitarian and development charities will need to undergo to provide needed assistance in far-flung parts of the world. Under the new legislation, the Public Safety Minister may grant development aid authorization upon referral from the Minister of Citizenship and Immigration and/or the Minister of Foreign Affairs, subject to the purposes set out in s. 83.032(1)(e). The legislation explains when the Minister of Foreign Affairs and/or the Minister of Citizenship and Immigration may refer an application to the Minister of Public Safety:

**83.032(6)** The Minister of Foreign Affairs, the Minister of Citizenship and Immigration or both of those Ministers, as the case may be, may refer an application if they are satisfied that

- (a) the application meets any requirements set out in the regulations;
- (b) the geographic area identified in the application is controlled by a terrorist group;
- (c) the activity proposed in the application is to be carried out for any of the purposes set out in paragraphs (1)(a) to (f);
- (d) that activity responds to a real and important need in that geographic area; and
- (e) the applicant is capable of administering funds, and reporting on that administration, in a manner that is transparent and accountable, in circumstances in which a terrorist group may use or benefit from property or financial or other related services.

The Minister of Public Safety may authorize the activity under certain conditions specified in the legislation:

**83.032 (9)** The Public Safety Minister may grant the authorization under subsection (1) if they are satisfied that

- (a) there is no practical way to carry out the activity proposed in the application without creating a risk that, in whole or in part, a terrorist group will use or benefit from the property or financial or related services at issue; and
- (b) the benefits of carrying out of that activity outweigh that risk, taking into account
  - (i) the referral of the Minister of Foreign Affairs, the Minister of Citizenship and Immigration or both of those Ministers, as the case may be,
  - (ii) the security review conducted by the Public Safety Minister under subsection (10),
  - (iii) any mitigation measures to minimize that risk, and any other terms and conditions, that may be included in the authorization, and
  - (iv) any other factor that the Public Safety Minister considers appropriate in the circumstances.

At the time of our consultation, the regulations and guidance on the legislation were still being developed. There is currently no way to determine the efficacy of this regime for development aid purposes. GAC officials explained that whatever the result of the current process, it will be subject to periodic review. For the NIRA Working Group, one concern remains whether and to what extent information about authorization requirements under Section 83.032(1)(2.1), and determinations of authorization proposals will be subject to review in coordination and cooperation with relevant charities in Canada, and subject to considerations of GBA+ and the *Charter*. The NIRA Working Group recognizes the importance of this legislation in creating new opportunities for Canada’s humanitarian and development relief agencies to operate freely, even in high-risk jurisdictions. At the same time, the process may prove too much of an onus on charities mindful of their own risk appetite with respect to Canada’s anti-terrorism financing regime and CRA audit processes given the Senate and Ontario Superior Court’s expressed concerns about overreach and bias.

#### B. Bill C41, Development Assistance, and the Fungibility Thesis

The consultations with Global Affairs Canada on C41 took place in the shadow of the Israel-Gaza war. This context offered a different orientation from the Government of Canada’s focus on Afghanistan and the Taliban as the principal context prompting C41’s passage. Despite the polarized political discourse on the conflict, humanitarian and development assistance organizations remain committed to help rebuild Gaza given the humanitarian and development catastrophe therein. Since 2006, Hamas has effectively controlled Gaza, and Hamas is on Canada’s list of terrorist entities. Moreover, the Government of Canada has a history of deregistering charities that support humanitarian relief in Gaza on the grounds that such relief aid implies an entanglement with Hamas.

The Working Group posed to GAC officials the example of IRFAN-Canada, a deregistered charity subject to a case study in the 2021 report, *Under Layered Suspicion*. In that case, the Government of Canada relied on the “fungibility thesis” to argue that any distinction between Hamas’s humanitarian wings and military wings was untenable. Aid given to the former, in the name of humanitarianism, constitutes budget relief that enables the military wing to conduct further acts of terror. The NIRA Working Group posed to GAC officials whether by virtue of C41, the Government of Canada now rejects the fungibility thesis, whether applied to Hamas or any other terrorist organization that may control a region requiring development assistance. No clarity was provided.

The NIRA Working Group expresses its concern that continued reliance on the fungibility thesis will effectively undercut the capacity of Canada’s humanitarian and development aid agencies to undertake anything more than mere subsistence level support in regions suffering catastrophe. To explain this concern, some context on the IRFAN-Canada charity is required.

In January 2006, Palestinians went to the polls to vote for leadership of the Palestinian Authority. Hamas secured 40% of the ballots, securing a majority in the Palestinian Legislative Council. This posed a problem for many countries that had funneled aid to the Palestinian Authority; many countries, including Canada, list Hamas on their respective terrorist entities list.

To recognize Hamas as the legitimate government of the Palestinian Authority, let alone ensure that funding continued to flow to the Palestinian authority, ran contrary to government policies and criminal code provisions. After Israel, the Government of Canada was the first country to cut off relations with and aid to the Palestinian Authority.<sup>72</sup> During Canadian Parliamentary debate at this time, the Government of Canada was severely criticized for inhibiting any and all humanitarian aid to Palestine and/or Gaza, even though it was led by Hamas.

IRFAN-Canada's audit occurred in the context of this political imbroglio. Any activities it had done in Gaza prior to the election was perfectly acceptable. But those same activities, after the Hamas election, were arguably in support of a terrorist organization. In its Administrative Fairness Letter (AFL) to IRFAN Canada, the Charities Directorate expressed its concern that IRFAN-Canada's activities were with organizations having ties with Hamas. It went further, however, and addressed an ongoing debate about Hamas in academic and policy circles. It reiterated the Government's position that no distinction is to be made between Hamas' military wings and its social support wings.

On this view, humanitarian support for social service delivery in Gaza through local partners that may have ties to Hamas is effectively "activity involving property or financial or other related services [that] could reasonably be expected to result in the terrorist group using or benefiting from the property or services, in whole or in part."<sup>73</sup> In other words, by providing support of a humanitarian nature, a relief agency provides budget relief to Hamas to conduct terrorist activities. This is what lawyers for IRFAN-Canada called "the fungibility thesis".<sup>74</sup>

After outlining the IRFAN-Canada audit and revocation, the NIRA Working Group asked Global Affairs Canada officials if Bill C41 constitutes a reversal of the Government of Canada's understanding of Hamas in particular, and its rejection of the fungibility thesis more generally. We asked this question in the context of ongoing concerns, including by the Government of Canada, of the humanitarian crisis in Gaza due to Israeli bombing of the region. Global Affairs Canada officials were non-committal on the implication of C41 on either the Government of Canada's current policy on Hamas or its embrace of the fungibility thesis more generally.

As NIRA Working Group members explained, if the fungibility thesis remains valid Canadian policy, whether with respect to Hamas or any other terrorist group, it is unlikely that any application under s. 83.032 of the Criminal Code would be approved by the Minister of Public Safety. At all times, development aid under C41 will constitute budget relief to a terrorist

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<sup>72</sup> Emon and Hasan, *Under Layered Suspicion*, 69-70.

<sup>73</sup> Criminal Code, s. 83.032(2).

<sup>74</sup> Emon and Hasan, *Under Layered Suspicion*. 78.

organization that controls a region, whether or not Canada recognizes that government. If the fungibility thesis remains intact, the most Bill C41 may do is authorize subsistence level humanitarian aid under the humanitarian exception. If our concerns prove to be true, MP Damoff's description of Canada as having a "long and rich history of fighting for human rights and delivering life-saving assistance abroad" will be Canada's past, not its present or future.

There is little doubt that Bill C41 is an important development with respect to funneling Canadian humanitarian aid to Afghanistan under the humanitarian exception. But with respect to development aid and assistance, the NIRA Working Group remains uncertain it will sufficiently assist development aid charities in Canada to fulfill their mandate.

Given the above analysis of C41, the NIRA Working Group recommends the following:

*Recommendation 4: The ACCS recommends to the Minister of National Revenue and the Commissioner of the CRA to secure clarification from the Ministry of Public Safety on whether and to what extent the new amendments to the Criminal Code under C41 constitute rejections of the Government of Canada's commitment to the fungibility thesis. In the event the fungibility thesis remains valid policy, the Minister of National Revenue and the Commissioner of the CRA should develop and publish guidance for the charitable sector on how to maneuver around contradictions between C41 amendments and the fungibility thesis.*

*Recommendation 5: The ACCS recommends to the Minister of National Revenue and the Commissioner of the CRA to strongly advocate that the Ministers of Public Safety, Global Affairs Canada, and Citizenship and Immigration create an Advisory Body to review C41 information responses, applications, and application decisions consisting of representatives from Public Safety, Global Affairs Canada, Citizenship and Immigration Canada, and leading humanitarian and development aid coordinating bodies in Canada (e.g., Cooperation Canada and Humanitarian Coalition).*

Such an advisory body will fill an important gap, and control against the current tendency to prioritize national security without effective regard to unintended consequences. This focused advisory body would complement the existing Advisory Committee on Money Laundering and Terrorist Financing (ACMLTF), which provides engagement between the government and reporting entities under the PCMLTFA. The ACMLTF currently provides no representation to those charities subject to the unintended consequences of AML/AFT compliance by these reporting entities.<sup>75</sup>

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<sup>75</sup> For more on the ACMLTF, see [https://www.canada.ca/en/department-finance/programs/committees/advisory-committee-money-laundering-terrorist-financing.html#:~:text=The%20ACMLTF%20is%20a%20high,\(AML%2FATF\)%20policy..](https://www.canada.ca/en/department-finance/programs/committees/advisory-committee-money-laundering-terrorist-financing.html#:~:text=The%20ACMLTF%20is%20a%20high,(AML%2FATF)%20policy..)