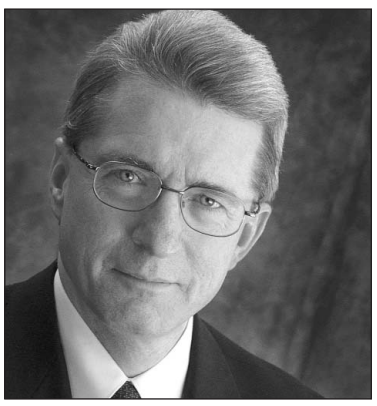
COMMENTARY: *Khawaja* does not adequately protect charities

By Terrance S. Carter and Sean S. Carter

Since the first wave of anti-terrorism legislation was declared in force in late 2001, its shadow has loomed large over Canadian charities and their foreign operations. The case of Mohammad Momin Khawaja, the first person to be charged under the core "terrorism" provisions in Part II.1 of the *Criminal Code* ("*Code")*, presented essentially the first chance to judicially review this controversial law.

In *R. v. Khawaja,* [2006] O.J. No. 4245, Justice Douglas Rutherford of the Ontario Superior Court of Justice, struck down a portion of a definition of "terrorist activity" in the *Code* that dealt with purpose and motive. The decision, released on Oct. 24, was met with mixed reviews by anti-terrorism legal commentators, some of whom initially heralded the case as a powerful blow to draconian legislation. However, the impact upon Canadian charities, which are particularly vulnerable to the sweeping "facilitation of terrorist activity" ("facilitation") provision in s. 83.19 of the *Code*, is not encouraging. In fact, the decision offers charities little relief from their susceptibility to unintentional contravention of the law.



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Khawaja's defense counsel raised three main challenges to the provisions of Part II.1 of the *Code*: overbreadth or vagueness; lack of a *mens rea* requirement; and the violation of *Charter* rights by the "political, religious or ideological purpose, objective or cause" portion of the 83.01(b) definition of "terrorist activity". The particularly troubling part of the decision for charities was the court's decision to uphold the law in terms of its breadth and the *mens rea* requirement concerning the definition of "facilitation". In this regard, there are significant risks that a charity involved in conducting aid or humanitarian programs in a conflict area could unwittingly be found to have facilitated a terrorist activity.

Justice Rutherford recognized that there would be situations "in the periphery" that would inadvertently be caught by the sweeping net of the definition, such as a doctor administering emergency aid to a patient involved in a "terrorist activity" or a waitress serving food to members of a "terrorist group". However, even though the decision recognizes that some humanitarian activities could be caught by the applicable definitions under the *Code*, the law as a whole was upheld because it purportedly would be counterbalanced by a "judicial determination". Yet, even if a trial judge adopted the same interpretation of the *Code* as Justice Rutherford, the detrimental effect on a charity and its operations would have already occurred once charges had been laid. A charity charged with facilitation could undergo the freezing of its charitable assets, and the charges would likely jumpstart the deregistration process under the *Charities Registration (Security Information) Act.* The fact that these types of charges were being laid in Canada against a charity would likely create a domino effect throughout a charity's worldwide operations. In addition, these charges would have a disastrous effect on donor confidence and public trust.

The potential for inadvertent contravention of the *Code* by charities was not helped by the fact that the decision upheld the definition of "facilitation", even though it was found to be in essence devoid of a *mens rea* requirement. This is particularly disturbing because charities are most at risk of unwittingly contravening the legislation in the course of their operations. Justice Rutherford acknowledged the significant concerns that the *mens rea* requirement was significantly diluted or even absent in the definition of "facilitation". However, likening the *mens rea* in the "facilitation" definition to "conspiracy" provisions in the *Code,* Justice Rutherford suggested that the diluted *mens rea* requirement should be interpreted as a "non-specific guilty mind". Justice Rutherford recognized that since this definition could conceivably encompass situations and activities not intended by the legislation, he again suggested that a "judicial determination" would temper the negative impact by filtering these charges.

The definition of "terrorist activity" and its "political, religious or ideological objective or cause" motive requirement was found to be an infringement on an individual's rights as guaranteed by the *Charter.* In his ruling, however, Justice Rutherford severed this portion of the definition from the rest of the anti-terrorism legislation, declaring the remainder of the anti-terrorism provisions to be in force. Whether the Crown's case prosecuting a charge of "terrorist activity" will now be easier in the absence of this element remains in question. Most, if not all, of the known perpetrated acts of terrorism in Canadian history would undoubtedly meet the motive requirement, therefore making its inclusion or exclusion irrelevant at

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Parks and mines among unique estate issues

By Karen Platten

As people's lives and the nature of their assets become more complex, estates also become more complex and estate practitioners must understand the nature and treatment of various assets.

We all know that there are complicated tax issues which can arise when corporate shares are held in an estate. The need to consult with an accountant or lawyer familiar with the tax issues is critical and timing is very important. Whether the company needs to be wound up in the first year after death or the shares transferred to a new corporation must be addressed early in the process so that double taxation can be avoided and every tax advantage can be realized. This is dependent on the type of assets held in the company and consultation with knowledgeable professionals is crucial at the outset of the estate.

Where a deceased held stock options in a corporation there are valuation issues to deal with as well as timing issues respecting when the options must be exercised. The time period for exercise imposed on the deceased will carry through to the estate. Sometimes other rights attach to the stock options which also must be addressed. For example, there may be other benefits which are tied to the exercise of the options, such as performance units, which means further cash to the estate. It goes without saying that the executor should be introduced to an experienced and knowledgeable broker so that the options and performance units can be properly dealt with in the time period allotted.

Another asset which can be problematic in an estate is an interest in a lease in a provincial or federal park. Every park seems to have different rules and different ways of transferring the lease. Often there are valuation issues which the parks will not address. It is up to the executor to find some meaningful value for the lease. If the lease allows for rental, then possible rental income over the term of the lease may be an appropriate value. If the lease is for the use of the lessee only then a valuation as to what the lease would sell for should be sought.

There are a number of documents required to transfer such a lease and you need to contact the particular park to find out what documents are needed in the specific estate. Overall I have found parks officials very easy to deal with and find it useful to fill out the required documents in draft and have the park official review them for suitability before they are signed.

Debts to the estate may also be difficult to deal with if the beneficiaries are not willing to assume the debt and the debtor, perhaps a child of the deceased, but not themselves a beneficiary, is not able to repay the debt. Conflict issues could arise where the executor, the surviving parent of the child, wants to forgive the loan or settle for something less than is owed and the other beneficiaries do not agree to doing so. In that

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situation the surviving parent usually ends up assuming the debt whether they can afford to or not. If the debt is known at the time of the estate planning it may be possible to come up with a solution before the problem occurs. Life insurance for the value of the debt is a possibility as is forgiveness of the debt where appropriate.

Canada Pension Plan survivor benefits, although not an asset of the estate, may also require some thought. In a situation where there is a spouse of a marriage and a common law spouse, Canada Pension advises that the full survivor's pension would go to the common

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"Moral duty" takes precedence over financial need in N.S. estate decision

By Timothy C. Matthews

A recent decision in a difficult case highlights the dual nature of Nova Scotia's *Testator's Family Maintenance Act* ["the Act"], the analogue of dependants' relief legislation in all the common law provinces.

In *Brown v. Brown Estate*, [2005] N.S.J. 271 (Nova Scotia Supreme Court), Justice Arthur LeBlanc considered the relative claims of two daughters who were clearly in financial need, on the one hand, and that of the son who was self-supporting but who had rendered significant services to his father based on the expectation that he would inherit the family farm. The father made a Will which substantially gifted his entire estate to his daughters, and only $500 to the son, contrary to the explicit promises he had made to his son to induce him to continue assisting the testator. When the son became aware of the terms of the Will, he angrily confronted his father, and a rift occurred between them which remained unresolved at the father's death.

The Act, like the British Columbia *Wills Variation Act*, confers a wide discretion on the trial judge " taking into account all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant." Any child of the deceased, regardless of age or financial circumstances, is eligible to claim as a "dependant".

Justice LeBlanc referred to the seminal and leading Nova Scotia decision of *Garrett v. Zwicker*, (1976), 15 N.S.R. (2d) 118 (Nova Scotia Court of Appeal), in which Chief Justice Ian MacKeigan, laid down a number of principles:

"The dependent claimant need not, however, show need in the sense of actual want in order to qualify for consideration under the Act, and need not show actual dependency upon the testator. The need is relative, relative to the extent of the estate and the strength of other claims." [at p. 133]

"To justify interference with a will a court must thus find a failure to provide 'proper maintenance and support', i.e., both a need for maintenance, relative to the size of the estate, and a moral claim, which may be of varying strength ... All 'dependants' of a testator do not necessarily have moral claims of equal strength. A testator is entitled, for example, to discriminate among his children, giving one more than another, for good reason or no apparent reason, so long as he commits no 'manifest wrong' in failing to give one the minimum that is 'proper maintenance and support' in the circumstances." [at p. 134]

"The question to be asked is moral, not economic. In ignoring the respondent in his Will, was the testator in all the circumstances guilty of a 'breach of morality', or a 'manifest breach of moral duty'?" [at p. 136]

This analysis had been recognized by the Supreme Court of Canada as early as *Walker v. McDermott*, [1930] S.C.J. 1, in which Chief Justice Lyman Duff noted that "proper maintenance and support" is not limited to the bare necessities of existence. Justice Beverley McLachlin (as she then was) in *Tataryn v. Tataryn*, [1994] S.C.J. 51, in referring to the earlier decision, stated that it recognized that the ambit of the British Columbia *Wills Variation Act* extended beyond need and maintenance. In her analysis of dependants' relief cases, Justice McLachlin referred to the narrow test (based solely on economic need) and the broad test or "moral duty approach". She set out a template for analysis of such claims, considering first the testator's legal responsibilities (that is, what duties did he owe to other family members during his lifetime, as imposed by statute or common law?); secondly, what moral duties did the testator have to consider conferring benefits on his family members at death? The moral duty arises from societal expectations that a testator will provide generously for a surviving spouse, and also for his children, if the size of the estate permits. She concluded that the legal obligations would generally take precedence over moral claims.

Justice LeBlanc in *Brown* noted that the Act explicitly refers to "any services rendered by the dependant to the testator" during the testator's lifetime, and several earlier cases that applied this factor in awarding a lump sum to the claimant. He wrote:

"It is unquestionable that the applicant's services, offered in expectation of one day owning the property, amounted to a substantial contribution to the maintenance and improvement of the estate property. It is equally clear that the applicant's contributions and services greatly outweighed those of his sisters, the other two dependants. But this does not end the analysis. This is not a question of contract or *quantum meruit*; the court must be guided by the requirements of the statute." [at para. [34].]

Noting that the comparative financial circumstances of the applicant and the other dependants, are an important consideration, particularly in view of the size of the estate, he found that Brown was self-employed, and owned his own business and equipment, as well as more than 100 acres of real property, mostly woodlots, as well as a residence. His real property was assessed at over $100,000, with a mortgage of about $44,000, and he owed $10,500 to his father.

The two sisters appeared to be "financially strapped" [para. [37]] while the son was "by far the most prosperous" [para. [39]]. The respondent daughter (to whom the deceased had devised his real estate) was not working and unlikely to work in the future, she did not own a home, and her only sources of income were a CPP survivor's benefit and social assistance. The other daughter (to whom the deceased had bequeathed his truck, his car and some furniture) was employed in a nursing home, and was able to get by, but she did not appear at trial.

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The estate was valued approximately at $100,000, with the father's farm property (22 acres in two parcels) and his house representing $68,000 of the total, the loan receivable from the son being $10,500, and the vehicles and miscellaneous assets representing the rest.

Justice LeBlanc awarded the claimant son one parcel of real estate (just under six acres) situated between his residence and his father's residence and forgiveness of the loan outstanding, to acknowledge his contributions to the upkeep and improvement to his father's property. As a result, the gift of the father's home to one daughter and the vehicles and furniture to the other daughter remained intact. Apart from the son's loan, there was not much residue after estate expenses. In view of the mixed result of the application, each party was ordered to pay his or her own costs.

This decision is an example of "moral duty" taking precedence over financial need. The judge was of opinion that the award more properly reflected the position of a judicious father seeking to discharge his parental duty.

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Profiling identified as problem

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best. Justice Rutherford recognized an inherent problem with the motive requirement, specifically that it can lead to racial or religious profiling. However, it is unlikely that vulnerable charities, especially those which are Islamic in purpose, would face less scrutiny by authorities because the motive requirement is now absent from the definition.

The decision in *R. v. Khawaja* does not bode well for charities that work outside of Canada. However, at least a door has been opened for further judicial review and scrutiny of anti-terrorism laws, as the decision did identify the problems of racial and religious profiling. Until further judicial scrutiny is undertaken, charities need to continue to be proactive in pursuing due diligence measures to try and minimize the risks inherent in the application of the existing anti-terrorism laws in Canada.

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