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ONTARIO COURT OF APPEAL RESTORES MOTIVE REQUIREMENT IN DEFINITION OF TERRORIST ACTIVITY

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A. INTRODUCTION

In a decision released December 17, 2010, the Ontario Court of Appeal overturned a lower court ruling,[1] which called into question the constitutionality of the "motive clause" contained in the definition of "terrorist activity" in the *Criminal Code* (Canada). The Court of Appeal in *R. v. Khawaja*[2] (the "Khawaja decision") backed the federal government's definition of "terrorist activity" to include violent acts that are committed for "political, religious or ideological purpose, objective or cause," concluding that although violent activity may convey meaning, it is excluded from constitutional protection "because violence is destructive of the very values that underlie the right to freedom of expression and that makes this right so central to both individual fulfillment and the functioning of a free and democratic society."[3] This Anti-terrorism Alert will briefly review this component of the Khawaja decision.

B. BACKGROUND

At the time of his arrest in 2004 by Canadian authorities, Mohammad Momin Khawaja was almost 25 years old and living in the family home in Ottawa. He was employed by a company doing contract work for the federal Department of Foreign Affairs and International Trade on a computer software-related project.

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[1] *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 (Sup. C.J.).
[2] 2010 ONCA 862.
[3] *Ibid*. at para. 101.

Khawaja, although born in Ottawa, spent several years living in various Muslim countries, including Libya, Pakistan and Saudi Arabia.

Khawaja came to the attention of Canadian law enforcement authorities as a result of "Operation Crevice", an investigation of suspected terrorists in London, England, which involved both physical and electronic audiovisual surveillance of the targeted suspects. Evidence gathered through Operation Crevice revealed that Khawaja had met with certain individuals in London and discussed a remote explosive detonator device that he was building in Ottawa for later use in bombing unspecified targets in the United Kingdom and elsewhere.

The RCMP arrested Khawaja on March 29, 2004 and charged him with terrorism-related offences under the *Criminal Code*.

C. KHAWAJA'S TRIAL DECISION

On a pre-trial motion, Khawaja challenged the constitutionality of the offence-creating provisions in Part II.1 of the Criminal Code (the terrorism offences), claiming that they were so vague and so broad as to violate section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"), which guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. These arguments failed at trial.

Khawaja also challenged the constitutionality of the definition of "terrorist activity", and in particular the "motive clause" in section 83.01(1)(b)(i)(A), which requires the Crown to prove that the relevant act or omission was committed "in whole or in part for a political, religious or ideological purpose, objective or cause." Khawaja argued that this provision infringed his rights under section 2(a) and (b) of the Charter, which guarantees freedom of conscience and religion and freedom of thought, belief, opinion and expression.

Justice Douglas J.A. Rutherford of the Superior Court of Justice concluded that the conduct defined in "terrorist activity" was not protected by any part of section 2 of the Charter. However, although he did not find a violation of section 2 of the Charter for anyone who might engage in the conduct defined as "terrorist activity", Justice Rutherford did find a violation in respect of individuals who shared, or could be seen as

sharing, some or all of the political religious or ideological beliefs associated with those who actually engage in "terrorist activity". In this regard, Justice Rutherford considered the "chilling effect" the impugned provision would have on those persons who shared or were seen by others as sharing views similar to those associated with "terrorist activity". The "chilling effect" would result in those persons refraining from espousing those views "either because of the public perception connecting those views to terrorism, or because of the government's tendency to focus its investigative resources on persons associated with those views."[4] This was attributed to the inclusion of the "motive clause" in the definition of "terrorist activity." Justice Rutherford wrote,

> … even in cases, however, in which the politics, religion or ideology of foreign persons or groups must be proven, it would be likely that such focus would have some impact in Canada. Canadians who might share the political, religious or ideological stripe of the foreign groups under scrutiny could not help but fall under some sort of shadow. It is exactly that sort of phenomenon that has given rise to concerns for racial or ethnic profiling and prejudice in the aftermath of the notorious terrorist actions in a number of countries around the world in recent years.
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> It seems to me that the inevitable impact to flow from the inclusion of "political, religious or ideological purpose" requirement in the definition of "terrorist activity" will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad.[5]

Justice Rutherford, while declining to declare the entire definition of "terrorist activity" of no force and effect, severed the impugned clause from the rest of the definition of "terrorist activity", leaving the remainder of the definition to be applied to the various offences that required proof of "terrorist activity." The Court of Appeal noted that the remedy granted by Justice Rutherford had the anomalous effect of easing the Crown's ultimate burden of proof by eliminating an essential element of the definition of "terrorist activity" as enacted by Parliament.[6]

D. THE COURT OF APPEAL DECISION

The Court of Appeal noted that the phrase "terrorist activity" does not prohibit or criminalize any political, religious, ideological thought, belief or opinion, but rather defines certain conduct. In fact, section 83.01(1.1) specifically states that "the expression of a political, religious or ideological thought, belief or opinion does

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[4] *Ibid*. at para. 66.
[5] *Ibid*. at para. 67, quoting paras. 52 and 58 of *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 (Sup. C.J.)..
[6] *Ibid*. at para. 69.

not come within … the definition of "terrorist activity" … unless it constitutes an act or omission that satisfies the criteria of that paragraph." Further, the Court noted that the definition of "terrorist activity" is complex, having both a conduct and a mental component. The mental component, according to the Court, is separated into three parts: (1) the act or omission must be done with the intention of bringing about death, bodily harm, endangering a person's life, causing serious risk to the health or safety of the public, causing substantial property damage or causing serious interference with an essential service; (2) the act or omission must be done with the further intention of intimidating the public or compelling a person, government or organization to do or refrain from doing any act; and (3) the act or omission must be done for a political, religious or ideological purpose, objective or cause.

The Court of Appeal wrote that while section 83.01(1)(b)(i)(A) is properly described as a motive clause, they attributed no significance in the constitutional argument to the fact that the section requires proof of motive.[7] The Court wrote,

> Parliament, in defining a crime, can require proof of the perpetrator's motive as an element of that crime. … A statutory provision that requires proof of motive is not constitutionally suspect. The motive clause in the definition of "terrorist activity" signals that Parliament has determined that motivation for the conduct described in the definition is a central feature of that which distinguishes terrorism from other crimes. On this view, terrorism is only properly described and labelled for criminal law purposes by including certain motives as a component of that definition.[8]

In considering the Charter arguments, the Court confirmed that activities that convey or attempt to convey meaning through a non-violent method is prima facie under the umbrella of section 2(b) of the Charter, stating that "the content of the meaning expressed or intended, that is, the message intended or actually conveyed, cannot deprive an activity of its expressive quality."[9] However, the Court also noted that there is ample precedent to confirm that expressive activity that takes the form of violence is not sheltered under section 2(b) of the Charter. The Court held that:

> Violent activity, even though it conveys a meaning, is excluded from s. 2(b) because violence is destructive of the very values that underlie the right to freedom of expression and that make this right so central to both individual fulfillment and the functioning of a free and democratic society. Expression conveyed through violent means coerces and dissuades others from exercising their rights, including their right

[7] *Ibid*. at para. 89.
[8] *Ibid*. at para. 93.
[9] Ibid. at para. 97.

> to freedom of expression. The use of violence to convey beliefs or opinions discourages others from testing the truth of those beliefs or opinions, discourages participation in social and political decision-making, and prevents others from achieving individual self-fulfillment through the expression of their own beliefs and opinions. To accord even *prima facie* protection under s. 2(b) to expression conveyed through violence is to undermine the very reason for the provision.[10]

The Court further noted that where it is the effect rather than the purpose of the legislation that limits expressive activity, the legislation will be found to violate section 2(b) only if the affected expression promotes the values underlying the right to freedom of expression, those being the pursuit of truth, participation in the community and individual self-fulfillment. The Court concluded that in this case, the conduct does not do that.

Turning to the "chilling effect" argument upon which Justice Rutherford found a constitutional violation, the Court of Appeal noted that a finding of unconstitutionality based on a collateral effect on persons whose conduct is not within the terms of the statute is unique to this case. In rejecting Justice Rutherford's finding, the Court held that "the judge's view of the indirect effect of the impugned definition is that it is founded entirely on speculation, both as to the existence of the 'chilling effect' and the cause or source of that 'chilling effect', if indeed one exists."[11] The Court concluded that in order to render the motive clause unconstitutional, Khawaja would need to demonstrate a connection between the reluctance and the motive clause. The Court suggested that "it is the nature of the activity and the nature of the state response that may generate the 'chilling effect', not the content of the legislation."[12]

The Court of Appeal concluded that the motive requirement in section 83.01(1)(b)(i)(A) is not unconstitutional.

[10] *Ibid*. at para. 101.
[11] *Ibid*. at para. 119.
[12] *Ibid*. at para. 130.

E. CONCLUDING COMMENTS

In addition to upholding the constitutional validity of the motive requirement in the definition of "terrorist activity", the Court of Appeal upheld the conviction of Khawaja and increased his sentence on terrorism-related charges to life in prison from his original sentence of 10½ years, saying "When terrorists acting on Canadian soil are apprehended and brought to justice, the responsibility lies with the courts to send a clear and unmistakable message that terrorism is reprehensible and those who choose to engage in it here will pay a very heavy price."[13]

The Khawaja decision was the first major challenge to Canada's broad anti-terrorism legislation that was brought into force in the wake of the 9/11 attacks in the United States. Although the Khawaja decision confirms the validity of a key component of Parliament's anti-terrorism regime, the breadth of the government's powers to combat terrorism remains largely unchallenged for both individuals and organizations that may come under suspicion.

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[13] *Ibid*. at para. 246.

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