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ANTI-TERRORISM AND CHARITY LAW ALERT NO. 11

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KHAWAJA DECISION AFFORDS LITTLE RELIEF FOR CHARITIES

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A. INTRODUCTION

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, Mr. Justice 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 October 24, 2006, 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 section 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.

B. COMMENTARY

Mr. 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. As has been discussed, however, exoneration at this stage may be too late for charities and their operations, the damage having already been done.

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 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.

C. CONCLUSION

The spectre of a Canadian charity being investigated and charged under the terrorism provisions of the *Code* is becoming more of a reality. Not only has Canada Revenue Agency recently been given significant resources dedicated to the oversight of the charitable sector,[1] the federal government has recently passed the latest round of anti-terrorism legislation that specifically targets monitoring and investigation of terrorism allegations against charities. Bill C-25 "*An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*" was granted Royal Assent on December 14, 2006. The amendments contained in this Bill will greatly increase the level of information sharing and collection among virtually all federal agencies that would potentially investigate or bring allegations and charges against charities and their directors and officers.

Given the context of recent legislative initiatives that focus on charities and terrorism, the decision in *R. v. Khawaja* does not bode well, particularly for charities that work outside of Canada. Charities have and continue to be treated as "crucial weak points" in the global "war on terror", and decisions like *Khawaja* underscore the fact that the tremendous burden of compliance with sweeping anti-terrorism legislation has not yet been lightened and made realistic.[2] However, at least a door has been opened for further judicial review

[1] Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness for Wednesday, May 18, 2005, transcripts available at: http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=117505

[2] Financial Action Task Force on Money Laundering, "Combating the Abuse of Non-profit Organizations: International Best Practices" 11October 2002.

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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