

ANTITERRORISM AND CHARITY LAW ALERT

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THE PERCEPTION AND INTERPRETATION BURDEN: THE CHARITY COMMISSION OF ENGLAND AND WALES POLICY ON CHARITIES AND THEIR ALLEGED LINKS TO TERRORISM

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A. INTRODUCTION

In the spring of 2002 the Charity Commission of England and Wales (the body responsible for the statutory regulation of charities in England and Wales) issued a press release and policy statement intended to clarify the “Charity Commission policy on charities and their alleged links to terrorism” [fn: PR 22/02, 13/03/2002].

The policy statement itself and the implementation of Charity Commission policy in this area since September 11, 2001 foreshadow a regime of unprecedented accountability for charities and their trustees in England and Wales and could have both direct and indirect implications for Canadian charities and their directors.

As described in the policy statement, the Charity Commission now essentially holds charities and their trustees, under threat of serious consequences, responsible not only for the charity’s actual activities, but also for the public’s perception of the charity’s activities. The policy has been actively implemented by the Charity Commission since the spring of 2002. A number of charities, because of suspicions or allegations of links to terrorism, have had their assets frozen or seized, the administration and management of the charity taken over, and full financial records seized.

B. SUMMARY

This alert highlights several concerns about the new compliance regime facing charities and their trustees with respect to allegations of “links to terrorism” as a result of the policy statement but is not intended to provide a comprehensive review of the policy statement.

The legislative definitions of terms such as “terrorism” are found in the United Kingdom’s *Terrorism Act 2000*, further supplemented by the *Anti-terrorism, Crime and Security Act 2001*. However, the policy statement does not deal with confirmed or substantiated links between a charity and terrorism, or even with situations where there may be reasonable grounds to believe that a charity might have such links. Rather, the policy addresses the Charity Commission’s response to allegations or suspensions of links to terrorism, regardless of the basis for such allegations. Allegations of links to terrorism are stated to be of “immediate priority” to the Charity Commission and any information and/or allegations considered by the Charity Commission will be passed on to law enforcement agencies for possible criminal investigation.

The policy statement specifically identifies trustees of charities, which in Canada would include directors, as having the responsibility to disassociate the charity from any activity that “may give, or appear to give, support or succour to any terrorist activity”. Trustees are expected to be proactive in ensuring that a charity’s “premises, assets, volunteers or other goods cannot be used for activities that may, or appear to, support or condone terrorist activities” and that “procedures are put in place to ensure that terrorist organizations cannot take advantage of a charity’s status, reputation, facilities or assets.” The Charity Commission further expands these responsibilities to render the charity and its trustees responsible for the public perception and interpretation of the charity’s activities, by requiring that charities take all necessary steps “to ensure their activities could not be misinterpreted.”

The implications of this policy statement are enormous, yet the policy fails to provide guidelines for charities on how to meet its requirements and ensure the proper perception and interpretation of the charity’s actions and use of its facilities, etc. The policy statement does not directly enumerate the consequences of failing to measure up to its requirements; however, it is clear that charities can expect serious consequences, including investigation by relevant law enforcement agencies. The policy statement itself cites examples of charities

that have been closed down or had their assets frozen and, since its publication in the spring of 2002, the policy document has been implemented in a number of cases with serious implications.

C. THE NEW "TOUGH LINE": ACTIONS TAKEN AGAINST CHARITIES BASED ON SUSPICION AND ALLEGATIONS

In a statement announcing the takeover of the Tamils Rehabilitation Organization as a result of an investigation into allegations of terrorist links in May, 2002, David Rich, the Charity Commission's Head of Investigations spoke of the necessity of taking a "tough line" approach. Although the inquiry had failed to produce evidence of links between the charity and terrorist activity, the Charity Commission appointed a receiver and manager to take over administration and management of the charity because of a lack of adequate financial controls and transparency uncovered during the investigation.

In the case of the International Development Foundation, the charity was shut down for seven months for suspicion of links with terrorism because it had been mentioned in a report to the French Parliament on terrorist financing. According to a Charity Commission press release, the Charity Commission "used a range of powers to obtain full financial records and documentation for the charity and to freeze the charity's bank accounts" during the investigation from January to July of 2002. At the end of the investigation, the Charity Commission cleared the International Development Foundation of "links to terrorism", finding that, while there was evidence of unsatisfactory financial controls, the allegations and suspicions about links to terrorism were unsubstantiated.

In another case, the Society of the Revival of Islamic Heritage had its assets frozen as a "temporary and protective measure" in January of 2002, because the United States Treasury placed a charity of a similar name on its list of designated terrorist organizations. After a seven-month investigation during which the charity was essentially non-operational, the Charity Commission determined that there was no evidence linking the charity with the charity or individuals named by the United States Treasury.

These cases reveal an intention on the part of the Charity Commission to take affirmative and aggressive action against a charity before concrete facts are assembled or allegations are properly substantiated.

Whether due to allegations made in a foreign parliamentary report, or for the simple misfortune of having a name similar to that of an impugned organization, all that is required is a misperception or suspicion for the Charity Commission to invoke its powers and launch an invasive investigation into an organization.

D. THE RELEVANCE OF THE CHARITY COMMISSION'S POLICY AND ITS PURSUANT ACTIONS TO CANADIAN CHARITABLE ORGANIZATIONS

The policy statement by the Charity Commission of England and Wales and its actions implementing it are relevant and potentially problematic for Canadian charities in several situations. First, this information is applicable to those charities that work in the United Kingdom, whether directly or through agency agreements with U.K. charities. Secondly, charities based in Canada that transfer funds or resources internationally from time to time could be affected if their international partners are U.K. charities. Thirdly, information or allegations entertained by the Charity Commission could be conveyed to Canadian authorities and directly impact a charity's status by forming the grounds for the issuance of a security certificate under the *Charities Registration (Security Information) Act* and the ensuing deregistration process (more information on this Act is available in *Charity Law Bulletin* No. 16, which is available at: www.charitylaw.ca as well as at www.antiterrorism.ca). Finally, the new policy of the Charity Commission of England and Wales might become a model or template for Canada as it develops its own policy position regarding charities and their alleged "links to terrorism".

Even if the investigation by the Charity Commission or any subsequent or related investigation by the CCRA completely absolves the U.K. or Canadian charity, the consequences of the investigation itself can be serious. Any Canadian charity that is involved in an investigation under this policy or any similar policy may face serious inconvenience at best, and possibly be subject to a serious interference with the pursuit of its charitable objectives, leaving the charity and its directors vulnerable to liability for breach of their fiduciary duties (for further discussion about these possible implications, please see "Charities and Compliance with Antiterrorism Legislation" an article presented to the Law Society of Upper Canada in November 2002, available at www.antiterrorism.ca).

E. CONCLUSION

The consequences of an allegation against a charity of being involved in terrorist activity are extremely serious. Nevertheless, allegations can stem from a variety of internal and external sources and circumstances over which a charity and its directors may have little or no control. Such allegations can even be made without the knowledge of the charity concerned, much less the opportunity to respond. For example, an allegation could be communicated in confidence by a hostile foreign government.

The Charity Commission's policy, however, makes charities and their trustees responsible for these allegations, founded or unfounded. It requires that not only the charity not support "terrorist activities" in fact, but also expects the charity to ensure that accusations are not levelled against it for any reason, whether such accusations are related to the charity's own activities or to activities that may be associated with its assets, personnel, or facilities. This policy statement signals a new paradigm of responsibility for charities in England and Wales, one that reverses the fundamental burden of proof and imposes a near impossible standard of not only compliance in fact, but compliance in perception.

Further information about the Charity Commission and the policy statement concerned is available at www.charitycommission.gov.uk or at www.antiterrorismlaw.ca