Following the Money Trail: How Canada's Anti-Terrorism Laws Impact Charities

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Abstract

Since 9/11, the Canadian government has increasingly used stringent anti-terrorism laws to confront the threat of misappropriation by Islamic charities of donor funds to support terrorist entities or operations. Such legislation enables protection of charities from being used as vehicles for terrorist financing. However, due to the broad wording of the anti-terrorism legislation, the complex nature of charities with international operations, and the vast amount of power afforded to the government, there is a strong possibility that the law, as it currently stands, will dampen the activities of legitimate and beneficial charities. This paper examines the impact of Canada's anti-terrorism laws in the context of recent American and Canadian cases in which Western-based Islamic charities were accused of diverting funds to foreign terrorist entities.

Keywords: Canadian anti-terrorism law, Canadian charities, Islamic charities, anti-terrorism, Holy Land Foundation for Relief and Development

Introduction

In the wake of 9/11, there was a significant increase in donations to charitable causes (Smith 2011). Americans alone gave $2.8 billion for the victims' families (Smith 2011). But even though charities at large were receiving more, donations by Americans to Islamic charities dampened as donors increasingly became concerned with the prospect of facing arrest or retroactive prosecution for donations made in good faith to Islamic charities; such charities were increasingly being targeted and implicated for funding the rising specter of Islamic terrorism (American Civil Liberties Union 2009, 8). Similarly, in light of increasing governmental scrutiny, Islamic charities themselves now face the dilemma of whether or not to pursue charitable activities. As it remains today, many Islamic charities continue to face reservations and handicaps in their fundraising of overseas operations (Dilley and Ryan 2012).

This negative post-9/11 atmosphere is not confined to the US but also permeates its neighbor to the north as Canada continues to adopt stricter approaches towards the surveillance

and scrutiny of the actions of Islamic charities by using increasingly draconian anti-terrorism legislation (Carter 2005). By reviewing the current state of the law and recent legal decisions, this paper will seek to establish that the anti-terrorism legislation which currently regulates Canadian charities is alarmingly broad, complex, and allows the Canadian government to forge connections between Canadian Islamic charities and foreign terrorist entities in a manner that is arbitrary, tenuous, and difficult to reconcile.

The HLF Case

Any exposition on the targeting of Islamic charities is incomplete without a case commentary on the Holy Land Foundation for Relief and Development (HLF), a charity set up to provide humanitarian assistance to Palestine. Prior to being stripped of its charitable status, HLF was one of the largest Islamic charities in the US (Claridge and Carter 2012, 1). In 2004, the US Court of Appeals for the Fifth Circuit found HLF to be in non-compliance with US anti-terrorism laws. A federal grand jury indicted HLF, three of its former officers, one former employee, and one person who had performed at a fundraising event for "providing material aid and support to a foreign terrorist organization (Hamas), engaging in prohibited financial transactions with a Specially Designated Terrorist (Hamas), [and] money laundering," as well as other non-terrorism related matters (2).

The charges against HLF were a result of the millions of dollars in donations made to HLF by US Muslims, which were then distributed by HLF to Palestinian *zakat* committees (Claridge and Carter 2012, 2). In a broad and disconcerting manner, the United States government was able to successfully argue that "by providing charitable support to Palestinians in the West Bank and distributing humanitarian aid through those committees, HLF [had] helped Hamas win the 'hearts and minds' of the Palestinian people [and that] the *zakat* committees were not legitimate charities and were only fronts for Hamas" (2).

It is worth noting that these Palestinian *zakat* committees did not appear on any global designated terrorist list and, moreover, there was no evidence of any knowledge, on the part of HLF, that these committees had affiliations with Hamas (Claridge and Carter 2012, 2). On the basis of such evidence, a reasonable question posed to any jury would have included: first, whether Hamas did in fact control and operate the alleged Palestinian *zakat* committees, and second, whether HLF had knowledge that Hamas was in control of such aforementioned committees (2). However, the court failed to instruct the jury to impute any knowledge of any intention upon HLF to support Hamas, leading to a seemingly far-fetched, tenuous, and rather weak trail leading from the pockets of Muslim American donors to alleged Palestinian terrorist operations conducted by Hamas (7).

Canadian charity law experts, Nancy E. Claridge and Terrence S. Carter (2012), have argued that, because of its many problematic legal aspects, the HLF decision should not be used

as a precedent for determining the future fate of Canadian charities (8). But, the same experts have taken note of the Canada Revenue Agency's (CRA) inclination to rely on the HLF decision in its own audit process, thereby opening the possibility of a long-winding and all-encompassing money trail to terrorism (5). If only for this fact – that this case may be used in the audit process of Canadian charities – the HLF decision serves as an important reference point for Canadian charities with foreign interests or partners.

Canada's Anti-Terrorism Legislation and Charities

Canadian charities are governed by part six of the *Anti-Terrorism Act,* which includes the relatively new *Charities Registration (Security Information) Act.*[1] Under the Act, the Canadian government has the authority to revoke the charitable status of an existing charity on the grounds that the charity has or will support a terrorist activity (sec. 4). The Act further allows the government to deny the application of a new charity for the reasons listed above (sec. 4). The deregistration process is initiated with the issuance of a security certificate against the charity, the consequences of which can go beyond the negative impact of loss of charitable status (sec. 5).

Under the Act, the power to take action against a charity rests jointly with the Minister of Public Safety and Emergency Preparedness (previously known as the Solicitor General of Canada) and the Minister of National Revenue (sec. 5). A security certificate may be issued if there are reasonable grounds to believe:

> (a) that an applicant or registered charity has made, makes or will make available any resources, directly or indirectly, to an entity that is a listed entity as defined in subsection 83.01(1) of the Criminal Code;
> (b) that an applicant or registered charity made available any resources, directly or indirectly, to an entity as defined in subsection 83.01(1) of the Criminal Code and the entity was at that time, and continues to be, engaged in terrorist activities as defined in that subsection or activities in support of them; or
> (c) that an applicant or registered charity makes or will make available any resources, directly or indirectly, to an entity as defined in subsection 83.01(1) of the Criminal Code an the entity engages or will engage in terrorist activities as defined in that subsection or activities in support of them. (sec. 4)

The very broad wording of the Act and the broad powers afforded to the government render Islamic charities and their employees "vulnerable to criminal prosecution for unwittingly providing support to organizations that on their face are not identified by any government as having links to terrorism" (Claridge and Carter 2012, 7). In fact, the deregistration process raises

1. *Charities Registration (Securities Information) Act, Statutes of Canada* 2001, c. 41. http://laws-lois.justice.gc.ca/eng/acts/C-27.55/.

several concerns. A plain reading of the Act indicates that no knowledge or intent is required on the part of the charity as to where its donations ultimately end up, nor does the charity need to have engaged in directly supporting a terrorist entity (Carter 2005).

Furthermore, under the deregistration process the normal rules of evidence do not necessarily apply (Carter 2005). Section seven of the Act "effectively waives the ordinary rules governing the admissibility of evidence" and states that "any reliable and relevant information may be admitted into consideration by a Federal Court judge whether or not the information is or would be admissible in a court of law" (44-45). This is particularly troublesome because it effectively means that "confidential" information that was relied upon by the government in making its determination of reasonableness need not be disclosed to the charity facing deregistration (47). This corrodes a fundamental principle of the law: the ability to know and meet the case being made against you.

Essentially, by giving the government broad powers to collect evidence and build a case behind closed doors, Canada's recent anti-terrorism laws have severely impeded the ability of those charities facing de-registration to know and meet the case against them. Carter (2005) suggests that it may also "severely handicap the ability of a charity to present a competent defense," which it certainly has (47). Since the burden of proof rests on the accused charity, one can only wonder how a charitable organization's employees would be able to build a successful defence given that there would exist little idea as to what charges might have been leveled against the organization, where they might originate from, and what the evidence might be.

All that is required for the government to take legal action against a charity is that the very low threshold of mere "reasonable grounds" is met (Carter 2005, 43). The Act does not define what "reasonable grounds" entails, and if a Federal Court judge finds that a security certificate is reasonable, then the charity is stripped of its charitable status (44). Once the decision is made the longstanding, revered right to appeal cannot help the maligned charity – the Federal Court decision to deregister is final (47). The effects of the security certificate affect the charity's status for a period of seven years (48). After seven years, if the government still believes the organization to be a risk, the deregistration process begins again. But, more likely than not, at the end of the seven years the charity is unlikely to exist (49).

The above becomes even more troubling when the financial consequences to the charity and the criminal charges that can be laid on its employees are taken into consideration. For instance, often the issuance of a security certificate can lead to a freezing and/or seizure of a charity's assets, eventually resulting in bankruptcy, insolvency and/or a complete shutdown of the charity.[2] Additionally, the directors of the charity can face civil liability for breach of their

2. *Criminal Code, Revised Statutes of Canada* 1985, c. C-46. http://laws-lois.justice.gc.ca/eng/acts/C-46/.

fiduciary duties (Carter 2005, 47). Furthermore, the specter of criminal liability also exists, as a charity's directors can possibly be found guilty for financing terrorism or facilitating a terrorist activity; both indictable offences carrying a maximum sentence of ten years and fourteen years respectively.[3] Needless to say, such a heavy onus on management to know how to follow the charity's money trail could very well lead to a decrease in qualified individuals seeking positions as directors of charities out of fear of civil or criminal prosecution.

The Chill Effect

As of 2012, the US has designated nine US-based charities as terrorist organizations. Of these nine, seven are Islamic charities (US Department of Treasury 2010). According to a 2002 policy brief called *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, published by British think tank The Overseas Development Institute (ODI), anti-terrorism measures implemented worldwide since 9/11 have had a global chilling effect on humanitarian efforts (cited in Pantuliano et al. 2011). There are numerous ways in which this chill effect manifests itself in the operation of Western-based Islamic charities (Carter 2005, 7).

For instance, donors that once, pre-9/11, had accepted the risk of some aid diversion as a byproduct of the cost of doing business now have a much more heightened awareness and fear of unintentionally and indirectly funding designated terrorist entities (Carter 2005, 7). This reluctance to donate is exemplified in a 2012 Brookings Institute report which notes that "donors who wish to support…charitable activities face a dilemma when assessing the qualifications of a particular charitable organization in what has been described as a 'climate of fear' [and] similarly, in reaction to their own changing regulatory obligations, financial institutions are increasingly risk averse in dealing with Muslim charities" (cited in Dilley and Ryan 2012, 7). This supports the likelihood of an already-apprehensive donor ceasing her donations altogether due to a fear that her contribution will be misappropriated. Additionally, the inspection of foreign counterparts and/or beneficiaries – a standard business practice of Canadian charities done to satisfy local Canadian donors that their funds are not at risk of misappropriation – can undermine relationships between that Canadian charity and the foreign local charity. Moreover, it can also "make local acceptance harder to achieve, thereby potentially compromising access to people in need" (Carter 2005, 9).

Last to be noted is the effort required by Canadian charities to avoid risk of misappropriation of funds by terrorist entities. As an example, in its brief, the ODI notes that "bank transactions are frequently stopped without explanation and organizations have to wait for up to three months while an investigation is carried out. They are often asked to bear the costs of these investigations, and even if they are cleared of any wrongdoing" (Carter 2005, 9). Ultimately, the burden on a charity of unwittingly being implicated for supporting terrorism are

3. *Criminal Code*, R.S.C. 1985, c. C-46 s. 83.02-83.04. http://laws-lois.justice.gc.ca/eng/acts/C-46/.

many, ranging from the threat of criminal charges laid upon its management, to administrative delays resulting in charities seeking to end operations in high-risk areas – typically, areas which require charitable aid the most (7).

Follow the Money Trail

A 2002 Canadian Security Intelligence Service (CSIS) report states that "with the possible exception of the [United States], there are more international terrorist organizations active in Canada than anywhere in the world" (cited in Gaffney 2006, 120). In order to carry out their efforts, the CSIS report notes that terrorists and their supporters are guilty of abusing Canada's immigration, welfare, and charity regulations (120). The case of the World Assembly of Muslim Youth Canada (WAMY Canada), which was stripped of its charitable status in 2012, is an example of an organization with blatant, immediate ties with al-Qaeda operations (Boesveld 2012). WAMY Canada ran Islamic camps and organized pilgrimages to Mecca for Canadian Muslim youth. In February 2012, WAMY Canada was stripped of its charitable status for failure to "keep proper books and records, maintain a specific chartable purpose and distinguish itself from parent organization WAMY (Saudi Arabia)" (Boesveld 2012). The connection between WAMY Canada and WAMY Saudi Arabia is not tenuous. In fact, the money trail from Canadian donors to the Islamic terrorist entity in question is rather easy to follow. As indicated by the CRA audit of WAMY Canada, the connection between the Saudi parent organization and its Canadian counterpart had been immediate lacking a separation between the activities of WAMY Canada and WAMY Saudi Arabia. In fact, the CRA audit indicates that all financial and operating decisions of WAMY Canada were in fact the decisions of its parent organization WAMY Saudi Arabia (Boesveld 2012).

Since WAMY Canada was so inextricably linked with the functioning of WAMY Saudi Arabia, it was reasonable for the CRA to assume that WAMY Canada would have at least some connection with the Benevolence International Fund of Canada (BIF). BIF had its assets frozen in 2002 by the Canadian government due to its link to Osama bin Laden's alleged attempts to acquire nuclear and chemical weapons (Boesveld 2012). Indeed, as the CRA audit illustrated, the link between WAMY Canada and BIF was strong and obvious. The two organizations shared a director, contact information, and a bank account (Boesveld 2012). On the basis of the above, the CRA concluded that WAMY Canada's actions were not exclusively charitable (Canada Revenue Agency 2012).

The case of WAMY Canada is an important one in the landscape of charity law. It serves as an example of a well-known, well-established Canadian Islamic charity that was likely complicit in financing or supporting terrorism. But, the mass sweep allowed by Canadian anti-terrorism legislation does not mean we have uncovered more WAMY Canadas. Instead, many other Canadian Islamic charities that have or are currently facing a loss of their charitable status

tend to have weaker connections and far more tenuous relationships with the alleged terrorist counterparts whom they are purportedly supporting.

An example of such a charity is the International Relief Fund for the Afflicted and Needy (IRFAN-Canada). In 2008, the CRA began inquiries into this organization because of allegations made by US prosecutors in 2007 that IRFAN-Canada had financial links to HLF and Hamas (Ridley 2012, 88). In 2010, Canada stripped IRFAN-Canada of its charitable status for failure to maintain adequate records and accounts (88). As Nick Ridley points out, in his book *Terrorist Financing: The Failure of Counter Measures*, the links between IRFAN-Canada to Hamas "were long and tortuous, and through several NGOs based in Gaza" (88). Ridley illustrates these "long and tortuous" links by describing the way in which HLF routed funds to IRFAN-Canada, which were then transferred on to a UK NGO/charity that then sent the funds onwards to Hamas. Hamas would then link Gaza NGOs to these funds as part of multiple fund transfers to many relief organizations in Gaza and Palestine (89).

Now, even though IRFAN-Canada appears to be far removed from its alleged terrorist counterpart and may, in fact, have never had motive to become a terrorist financier it became recognized as one nonetheless. Another useful illustration of a "long and tortuous" (and arguably unfair) link is the 2009 Ontario Superior Court of Justice's decision in *R. v. Ahmad*.[4] The charity in question provided funds for humanitarian activities in Gaza. The government argued that by providing funding for humanitarian activities in Gaza, the Canada-based charity was providing Hamas (a designated terrorist entity) the means to spend the money of Canadian donors. Such associations make it seemingly impossible to dissociate legitimate contributions from illegitimate ones (para. 80).

Currently, the Canadian government continues with its stringent stance of cracking down on Islamic charities, as is evidenced by the recent deregistration of the prominent Islamic Society of North America (ISNA Canada). On its web homepage, ISNA Canada describes its purpose as "establishing a vibrant presence of Muslims in Canada" by being "a platform for all Muslims who share its mission and are dedicated to serving the needs of Muslims and Muslim communities" (Islamic Society of North America 2013a). Many Muslims donate hundreds of thousands of dollars to ISNA Canada because of its longstanding reputation as one of the largest and most reliable Islamic charitable organizations, offering several ways in which Canadian Muslims can fulfill their mandatory *zakat* obligations by sending money to those in need "back home." ISNA Canada's website states that all donations are used for various programs including, but not limited to, the following: facilities and maintenance, Ramadan services, food banks, and emergency *zakat* for needy families (Islamic Society of North America 2013b). Despite its large and important presence in the lives of Canadian Muslims, its many years of work on a national

4. *R. v. Ahmad*, [2011] 1 S.C.R. 110, 2011 SCC 6. http://canlii.ca/t/2bxxw.

level to promote and protect Muslim interests in North America, and its events that are endorsed and attended by prominent Canadian politicians, ISNA was stripped of its charitable status on September 21, 2013 (Canada Revenue Agency 2013; Jeffords 2013).

In its 2013 Notice of Intention letter, in accordance with section 168(1) of the *Income Tax Act*, the CRA wrote that:

> Our analysis of the information obtained during the course of the audit has led the CRA to believe that the Organization [ISNA] had entered into a funding arrangement with the Kashimiri Canadian Council/Kashmiri Relief Fund of Canada (KCC/KRFC), non-qualified donees under the Act, with the ultimate goal of sending the raised funds to a Pakistan-based non-governmental organization named the Relief Organization for Kashmir Muslims (ROKM) without maintaining direction and control. Under the arrangement, KCC/KRFC raised funds for "relief work" in Kashmir, and the Organization supplied official donation receipts to the donors and disbursed over $281, 696 to ROKM, either directly, or via KCC/KRFC. (cited in Canada Revenue Agency 2013)

The CRA letter went on to state that, according to their research:

> ROKM is the charitable arm of Jamaat-e-Islami, a political organization that actively contests the legitimacy of India's governance over the state of Jammu and Kashmir, including reportedly through the activities of its armed wing Hizbul Mujahideen. Hizbul Mujahideen is listed as a terrorist entity by the Council of the European Union and is declared a banned terrorist organization by the Government of India, Ministry of Home Affairs, under the *Unlawful Activities (Prevention) Act of 1967*. Given the commonalities in directorship between ROKM and Jamaat-e-Islami, concerns exist that the Organization's resources may have been used to support the political efforts of Jamaaat-e-Islami and/or its armed wing, Hizbul Mujahideen. (cited in Canada Revenue Agency 2013)

The CRA's above letter of revocation is a clear indication that Canada has taken a stand against the abuse of charities. Because the anti-terrorism laws, as they apply to charities, do not permit a "charity defense," a charity like ISNA Canada cannot shield itself from liability simply on the basis that its donations were earmarked for humanitarian, charitable, and non-terrorist activities (Rowe 2009, 395). What the above portrays is a connection that best fits Ridley's description of a "long and tortuous" link (Ridley 2012, 88). If the CRA will revoke the charitable status of ISNA Canada for fueling the political efforts of terrorist organizations based in India by way of a circuitous and winding connection extending across the borders of Kashmir to Pakistan to India, it is no wonder then that this "climate of fear" persists (Dilley and Ryan 2012, 1). For both charity and for donor, simply bearing the burden of suspicion may be enough to put them off charitable giving.

Post-9/11, the *Wall Street Journal* described terrorism financing by Islamic charities as a "byzantine world…where alliances are often tangled," where organizations "move and evolve rapidly," and where "rooting out money" that is meant to fuel terrorism is "particularly difficult" (Cohen et al. 2001). Adding to this conception is a region with already convoluted politics and a situation in which terrorist organizations take on activities that include: "Fundraising, lobbying through front organizations, providing support for terrorist operations in Canada or abroad, procuring weapons and material, coercing and manipulating immigrant communities in Canada, facilitating transit to and from the US and other countries, and other illegal activities" (Anti-Defamation League, 2004). Alan Cohen, a former New York federal prosecutor, had rounded off on this issue succinctly when he said, "as a practical matter, chasing charities won't get anyone anywhere because the money is so well-hidden and much of it may be in the accounts of intermediaries like foreign banks and money managers" (cited in Cohen et al. 2001).

Conclusion

The Brookings Institute report correctly noted that "given the size, scope, and diversity of the worldwide charitable sector, a single solution is unlikely to address the legitimate objectives of all concerned" (Dilley and Ryan 2012, 2). Canada has over 86 thousand registered charities and with this fact comes an intricate network of donors, stakeholders and members (Charity Intelligence Canada 2014). Simply put, the charitable sector in Canada is complex. Equally complex is the task of countering terrorism, which too boasts its own intricate network. Given the complex nature of this area of the law, the importance of regulation is clear. However, as discussed above, any regulatory legislation must come equipped with the necessary provisions required by the law: namely, the duty to know and be able to meet the case against you.

As the American and Canadian cases discussed above indicate, it is likely that a Canadian charity has or is facilitating terrorism using the dollars of Canadian donors. In light of this fact, some experts in the field and certain politicians maintain that actions such as freezing a charity's assets are important messages to send to abusers of the systems and may help deter those who seek to fund the coffers of terrorism (Cohen et al. 2001). Others question whether freezing assets or bank accounts can truly impede a terrorist entity's funding sources (Cohen et al. 2001). Regardless, it is not difficult to see why in the post-9/11 world it is important for Canadian charities to function transparently. The ability to inspire the trust and confidence of their many stakeholders should be a priority for any Canadian charity – Islamic or not.

The full impact of Canada's anti-terrorism laws will be felt gradually. But one fact is certain: at present the law overburdens legitimate charities with legitimate foreign interests. As Nancy E. Claridge and Terrance S. Carter (2012) point out, the Canadian government must maintain a balance between achieving collective, national security without unduly curtailing civil liberties and deterring potentially well-meaning actors working in the charitable and non-profit sector (8). Similarly essential is the need for organizations with foreign interests to develop an

understanding of the law, its impact on their operations, and the necessity of thorough due diligence.

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