CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

ANTI-TERRORISM & CHARITY LAW ALERT NO. 25

AUGUST 19, 2011

EDITOR: TERRANCE S. CARTER

PATRIOT ACT/HOLDER DECISION: CONTINUED CONCERNS FOR CANADIAN CHARITIES

By Nancy E. Claridge and Terrance S. Carter[*]

A. INTRODUCTION

Canadian charities working in the United States or in conjunction with U.S. charities in conflict zones will need to keep abreast of recent legislative and judicial developments in the U.S., with the extension of controversial provisions of the Patriot Act and the U.S. Supreme Court's decision on the material support laws. This *Anti-terrorism and Charity Law Alert* will review these developments in relation to their impact on Canadian charities.

B. EXTENSION OF PATRIOT ACT

President Barack Obama signed a four-year extension of three controversial provisions of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act) (the "Patriot Act") into law just before the midnight deadline of May 26, 2011. The three key provisions include (1) roving wiretaps, (2) searches of business records (the "library records provision"), and (3) conducting surveillance of "lone wolves" — individuals suspected of terrorist-related activities not linked to terrorist groups. The extension came despite warnings from senators that intelligence agencies are relying on secret interpretations of the Patriot Act of which most Americans are not aware. While there are numerous interpretations of how the Patriot Act works, the official government interpretation of the law remains classified.

[*] Nancy E. Claridge, B.A., M.A., LL.B., is an Associate at Carters Professional Corporation and Terrance S. Carter, B.A., LL.B., Trade-mark Agent, is Managing Partner of Carters Professional Corporation and counsel to Fasken Martineau DuMoulin LLP on charitable matters.

The Senate approved the final version of the Patriot Act extensions by a 72 to 23 vote, and the House followed with a 250 to 153 vote prior to President Obama signing it into law. The extension – referred to as a "clean extension" – did not include any new civil liberty safeguards. The last renewal of the Patriot Act occurred in February 2011, with the tacit understanding that civil liberties reforms would be considered before its May 27 12:01 a.m. expiration. The extension of the three controversial provisions without the introduction of any civil liberty protections and the continued classified nature of the interpretation of the Patriot Act will have far-reaching implications for both U.S. and counterpart Canadian charities working in conflict zones.

C. THE HOLDER DECISION

The Patriot Act has been a source of significant controversy since its introduction in 2001, which has only increased since the release of the U.S. Supreme Court's decision in *Holder v. Humanitarian Law Project* in June 2010 (the "Holder decision").

The Holder decision involved two U.S. citizens and six domestic organizations, including the Humanitarian Law Project ("HLP"), a human rights organization with consultative status to the United Nations, and focused on the constitutionality of 18 U.S.C. §2339B, which makes it a federal crime – punishable by up to 15 years in prison – to "knowingly provid[e] material support or resources to a foreign terrorist organization." The term "material support or resources" means:

> … any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include onself), and transportation, except medicine or religious materials.

Although not at issue in the Holder decision, §2339B also provides extraterritorial jurisdiction for this offense, extending the long-arm of the law to a number of situations, including circumstances where the "offender" is "brought into" or "found" in the United States.

At issue in the Holder decision was HLP's wish to provide support for the humanitarian and political activities of two organizations that have been designated as "foreign terrorist organizations" ("FTOs") by the U.S. State and Treasury Departments: the Kurdistant Workers' Party (also known as the Partiya Karkeran

Kurdistant, or PKK) and the Liberation Tigers of Tamil Eelam ("LTTE"). HLP's proposed support was to be in the form of teaching and advocating the use of international law and other non-violent means to reduce conflict and advance human rights to the FTOs.

HLP challenged §2339B's prohibition on providing four types of material support: training, expert advice or assistance, service and personnel, asserting violations of the Fifth Amendment's Due Process Clause on the ground that the statutory terms were impermissibly vague, and violations of their First Amendment rights to freedom of speech and association. HLP also claimed that §2339B was invalid to the extent it prohibits them from engaging in certain specified activities.

1. The Majority Decision

Chief Justice Roberts, writing for the Court, upheld the material support provision, concluding that the material support statute "provide[s] a person of ordinary intelligence fair notice of what is prohibited", and did not ban "pure political speech." Writing that "everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order," Chief Justice Roberts concluded that "we are convinced that Congress was justified in rejecting [the] view" that "ostensibly peaceful aid would have no harmful effects." As such, Chief Justice Roberts accepted that "material support" is a valuable resource and frees up other resources within the organization that may be put to violent ends and helps lend legitimacy to FTOs, saying legitimacy "makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks."

The Court rejected HLP's contention that the Court should interpret the material support statute, when applied to speech, to require proof that a defendant intended to further a FTO's illegal activities, saying that interpretation was inconsistent with the text of the statute, which the Court said includes the necessary mental state for a violation to be knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.

2. The Minority Decision

Justice Breyer, writing for Justices Ginsburg and Sotomayor in dissent, agreed with the Court as to the issue of the statute's vagueness, but did not agree with the conclusion that "the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and

advocacy furthering the designated organizations' lawful political objectives", writing that it was "elementary" that this speech and association for political purposes sought by HLP is the kind of activity to which the First Amendment ordinarily offers its strongest protection. Justice Breyer confirmed the principle that the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected, and argued that "not even the 'serious and deadly problem' of international terrorism can require automatic forefeiture of First Amendment rights." Justice Breyer went on to suggest that "at the very least" the Court should "measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." In order to avoid the constitutional problem, Justice Breyer suggested that he would read the statute as "criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions," thereby introducing a *mens rea* component to the statute. Justice Breyer concluded, writing:

> I believe the Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

D. CONCLUDING COMMENTS

Canadian charities working in the U.S. or in conjunction with U.S. charities in conflict zones will have cause for concern with the impact of the Patriot Act on their programs and operations. In this regard, the Holder decision highlights a number of troubling issues with respect to the ability of charities to carry out programs in conflict zones that are intended to improve the lives of vulnerable persons, as lawful activities can be deemed unlawful simply in reference to the persons participating in the activity, namely alleged terrorists or terrorist sympathizers. There is the further concern that the official U.S. government interpretation of the anti-terror laws remains classified, making compliance a moving target.

Charities also need to be concerned with the long-arm of U.S. anti-terror laws, which can extend their application to non-U.S. residents and to events that have not taken place in the U.S. by very tenuous threads, including travel by individuals to or through the U.S.

The paucity of judicial interpretation of U.S. and Canadian anti-terror laws is an additional concern for Canadian charities, as the Holder decision, while a decision of the U.S. Supreme Court, may still hold judicial sway in Canadian regulatory and judicial proceedings, including those carried out by Canada Revenue Agency.

Canadian charities should continue to monitor these developments in order to properly assess the risk that engaging in programs in the U.S. and in conflict zones will pose to the organization's future.