

HUMANITARIAN AID AUTHORIZATION PROPOSED IN BILL C-41

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A. INTRODUCTION

When the Taliban returned to power in Afghanistan in August 2021, several crises ensued, including a dire need for humanitarian aid in the region. Unfortunately, Canadian non-governmental organizations (“NGOs”) ran into difficulty in providing aid to the people in Afghanistan due to Canada’s overly broad anti-terrorist legislation. These issues were highlighted in a report from the House of Common’s Special Committee on Afghanistan, “Honouring Canada’s Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety” released in June 2022,¹ as well as in the Standing Senate Committee on Human Rights report, “Interim Report on Canada’s Restrictions on Humanitarian Aid to Afghanistan” released December 14, 2022.² Specifically, these reports identified that the federal government needs to act quickly so that registered Canadian humanitarian organizations “have the clarity and assurances needed – such as carve-outs or exemptions – to deliver humanitarian assistance”³ and should “introduce legislation to create an explicit humanitarian exemption to section 83.03(b) of the

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¹ House of Commons Special Committee on Afghanistan, “Honouring Canada’s Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety: Report of the Special Committee on Afghanistan” (8 June 2022), online <<https://www.ourcommons.ca/DocumentViewer/en/44-1/AFGH/report-1>> (“House Report”).

² Standing Senate Committee on Human Rights, “Interim Report on Canada’s Restrictions on Humanitarian Aid to Afghanistan” (14 December 2022), online: <https://sencanada.ca/content/sen/committee/441/RIDR/reports/2022-12-14_RIDR_Report_FINAL_e.pdf> (“Senate Report”).

³ House Report, *supra* note 1 at Recommendation #10.

Criminal Code”.⁴ In response, the Minister of Public Safety introduced Bill C-41, “An Act to amend the Criminal Code and to make consequential amendments to other Acts” in the House of Commons on March 9, 2023.⁵ The changes introduced by Bill C-41 are intended to “support Canada’s deep commitment to the people of Afghanistan, while upholding [Canada’s] domestic and international obligations to combat terrorism.”⁶

The government is to be commended for listening to the reports from the special committees, and the advocacy from Canadian NGOs,⁷ as well as advocacy from the broader charitable sector⁸ by acting to further Canada’s commitment to the people of Afghanistan. In this regard, fast and effective actions are necessary to address the ongoing challenges that NGOs face when trying to provide humanitarian aid internationally. However, serious consideration needs to be given to the long term and possibly unintended consequences of Bill C-41.⁹ The proposed measures introduced by Bill C-41 raise concerns about a subjective authorization process and a very narrow scope of authorization. These concerns are explained in Section C of this Alert.

B. OVERVIEW OF BILL C-41

Bill C-41 proposes to amend section 83.03(b) of the *Criminal Code* (in addition to some other minor changes to other parts of the *Criminal Code*, the *Income Tax Act*, and the *Excise Tax Act*). Currently, section 83.03(b) of the Code states that every person is guilty of an indictable offence who, among other things, directly or indirectly makes available property knowing that it will be used by or will benefit a terrorist group.¹⁰ This provision is broad enough to include circumstances where NGOs pay taxes, some of which may go to the Taliban – a terrorist group and the *de facto* government of Afghanistan. Therefore,

⁴ Senate report, *supra* note 2 at Recommendation #4.

⁵ Bill C-41, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, 1st Sess, 44th Parl, 2023 (second reading 27 March 2023).

⁶ Public Safety Canada, “Government introduces legislation to support humanitarian aid to vulnerable Afghans” (9 March 2023) online: *Government of Canada* <<https://www.canada.ca/en/public-safety-canada/news/2023/03/government-introduces-legislation-to-support-humanitarian-aid-to-vulnerable-afghans.html>>.

⁷ Several of Canada’s largest humanitarian aid agencies joined together to advocate for changes to Canada’s laws. Further information can be found on their website, <aidforafghanistan.ca>.

⁸ Canadian Bar Association, Letter to The Honourable David Lametti, P.C., M.P., and The Honourable Marco Mendicino, P.C., M.P., (22 July 2022) online: *The Canadian Bar Association* <<https://www.cba.org/CMSPages/GetFile.aspx?guid=b7386a78-e843-4470-b77e-0c43221e440c>> (“CBA Letter”).

⁹ See Section C for more details.

¹⁰ *Criminal Code*, RSC 1985, c C-46, s 83.03(b).

Bill C-41 proposes to add an exception to the legislation so that section 83.03(b) will not apply to a person who has been granted an authorization under the proposed new section 83.032 of the Code.¹¹

Section 83.032 is a lengthy, detailed and complex provision. The proposed general process under this provision for an NGO to receive an authorization to provide humanitarian aid can be summarized as follows:

1. To apply for an authorization, an NGO will need to show that they plan to carry out a specific activity for one of the following purposes:
 - a. providing or supporting the provision of
 - i. humanitarian assistance,
 - ii. health services,
 - iii. education services,
 - iv. programs to assist individuals in earning a livelihood,
 - v. programs to promote or protect human rights,
 - vi. services related to immigration, or
 - b. supporting any operations of a federal minister, department or agency of the Government of Canada for a purpose other than those set out above in (a).¹²
2. An NGO will then need to apply to the Minister of Foreign Affairs, or – if it involves services related to immigration – the Minister of Citizenship and Immigration.¹³
3. Next, the relevant Minister will review the application and may only refer it to the Public Safety Minister if:
 - a. they are satisfied that:
 - i. the application meets requirements set out in the regulations under the *Criminal Code*;
 - ii. the geographic area referred to in the application is controlled by a terrorist group;
 - iii. the activity will be in support of a permitted purpose and responds to a real and important need in the geographic area; and

¹¹ Bill C-41, *supra* note 5 at s 1 (specifically, at proposed s 83.032).

¹² *Ibid* (specifically at s 83.032(1)).

¹³ *Ibid* (specifically at s 83.032(5)).

- iv. the NGO is capable of administering funds and reporting on that administration;
and
 - b. in the referral, they set out their assessment of how the application meets the conditions in (a).¹⁴
4. The next step is that the Public Safety Minister must conduct a security review which could consider, among other factors, the likelihood that any person involved in carrying out the activity is being or has been investigated for having committed a terrorism offence.¹⁵
5. The Public Safety Minister may grant an authorization (subject to any terms and conditions that they think are required) for a period of not more than five years when they are satisfied that:
- a. there is no practical way to carry out the activity proposed in the application without creating a risk that a terrorist group will benefit from the property, and
 - b. the benefits of the activity outweigh the risk of terrorist financing, taking into account several factors, including any factor that the Public Safety Minister considers appropriate.¹⁶

The further additions of sections 83.033-83.0392 to the *Criminal Code* are proposed in Bill C-41. These provisions set out details regarding the refusal of an application, additional security reviews, renewals of authorizations, amendments to authorization, suspension and revocations of authorizations, information disclosure between the Public Safety Minister and certain government agencies, a judicial review process, and annual reporting requirements.¹⁷

Bill C-41 would also amend the *Income Tax Act* and *Excise Tax Act* so that an official may provide confidential information to any other official for the purposes of a security review where “the information can reasonably be considered to be relevant to the security review.”¹⁸

C. AREAS OF CONCERN

A comprehensive explanation of the many concerns posed by Bill C-41 is well beyond the scope of this Alert, as the provisions in Bill C-41 are incredibly detailed, lengthy, and complex. As an example, the indictable offence of making property available for use by a terrorist group set out in 83.03(b) of the

¹⁴ *Ibid* (specifically at s 83.032(6)).

¹⁵ *Ibid* (specifically at s 83.032(10)).

¹⁶ *Ibid* (specifically at ss 83.032(9), (12), and (14)).

¹⁷ *Ibid* (specifically at ss 83.033-83.0392).

¹⁸ *Ibid* at ss 4 and 5.

Criminal Code is described in 72 words, whereas the authorization to provide humanitarian assistance in the proposed section 83.032 is described in over 1200 words. Proposed sections 83.033-83.0392 (which describe processes in relation to authorization) are also, collectively, over 1200 words in length. This means that the proposed legislative exception to the offence of making property available to a terrorist group is more than 33 times longer than the description of the offence itself.

As it is currently written, Bill C-41 raises many concerns,¹⁹ but two overarching themes will be covered in this Alert: (1) the exception is discretionary and (2) the exception is too narrow in scope.

1. Bill C-41 grants a discretionary exemption that can be withheld or revoked without providing an NGO documented reasons

Unlike a blanket exemption that would recognize all genuine humanitarian efforts made in good faith as permissible exemptions from the Code's anti-terrorism provisions, Bill C-41 represents an intricate process by which NGOs will need to ask for the government's permission to provide humanitarian aid in situations where there is a risk that some portion of an NGO's resources will go to terrorist groups. It is possible that for some NGOs, this process of asking for permission could be relatively quick and efficient. However, it is equally possible that for other NGOs, the process of applying for authorization could be lengthy, onerous, and ultimately unsuccessful. Whether an NGO's application is subject to extensive review is decided by the Ministers of Public Safety; Foreign Affairs; and/or Citizenship and Immigration. When section 83.032 uses language such as "may consider", "may refer", "may request", "may grant", "may deem", "among other [unspecified] factors", and "subject to any terms and conditions that, in [the Public Safety Minister's] opinion, are required", it grants extensive discretion to these Ministers in the process of considering an NGO's application for authorization. In fact, in subsection 83.032(9) (summarized as step 5 above), the Minister of Public Safety's final decision to grant an authorization rests on a cost benefit analysis which requires that the Minister be "satisfied" that the benefits of an NGO's activity "outweigh that

¹⁹ To learn more about concerns not covered in this Alert, please see "ICLMG Response to Criminal Code Amendments on Counterterrorism and International Assistance" (10 March 2023), online: *International Civil Liberties Monitoring Group* <<https://iclmg.ca/iclmg-response-to-criminal-code-amendments-on-counter-terrorism-and-international-aid/>>. See also "MSF response to new Canadian government counterterror laws" (9 March 2023), online: *Médecins Sans Frontières / Doctors Without Borders* <<https://www.doctorswithoutborders.ca/article/msf-response-new-canadian-government-counterterror-laws>>.

risk” posed by the activity. While this decision must be informed by certain information, this balance of benefits and risk is entirely subjective.

Further, if there was to be a judicial review of these decisions, then if a judge was of the opinion that the disclosure of the evidence or other information “could be injurious to international relations, national defence or national security or could endanger the safety of any person”, neither the applicant nor the public will be entitled to be informed of the reasons for the relevant Minister’s decisions, leaving it only for the judge to decide (in the absence of any response from the applicant) if the Minister’s decisions were justified.²⁰

Finally, there is significant discretion granted to government entities as to the extent of information shared during a security review of an application for authorization. Intelligence and national defence organizations, as well as the Canada Revenue Agency and certain government departments “may assist” the Public Safety Minister in any of the processes related to the authorization. This assistance is anticipated to include “collecting information from and disclosing information to that Minister and each other”.²¹ The type of information and the extent of information that may be collected or shared is not specified.

As a practical concern, organizations that perceive that they have received unfair and/or unequal treatment from the federal government in the past are likely to distrust the process set out above. Further, if unfair treatment of a certain portion of the charitable sector were to occur in the process of applying for authorization, Bill C-41 makes such treatment very difficult to prove or dispute.

2. Bill C-41 is too narrow in scope

In addition to the concerns above, there remains the issue that the authorization described in Bill C-41 is too narrow in scope to be effective in most circumstances:

- The authorization does not provide an exception to other relevant anti-terrorism provisions. Section 83.03(b) of the *Criminal Code* is not the only legislative barrier for NGOs wishing to provide humanitarian aid in countries like Afghanistan. Section 83.04 of the *Criminal*

²⁰ Bill C-41, *supra* note 5 at s 1 (specifically at ss 83.039(2)(a) and (c)).

²¹ *Ibid* (specifically at s 83.038).

Code makes it an offence for an organization to directly or indirectly use property for the purpose of facilitating a terrorist activity, which could potentially include instances where a charity does not know that terrorist activity was being facilitated, where terrorist activity was not foreseen or planned at the time of facilitation and where no terrorist activity was actually carried out.²² This is a concern because any person (including an NGO) that has committed an act or omission that is punishable under Part II.1 of the Criminal Code (the anti-terrorism provisions) could be sued for the resulting loss or damages under the *Justice for Victims of Terrorism Act*.²³ Additionally, under the *Charities Registration (Security Information) Act*, charities can face potential revocation of their registered charitable status if there are reasonable grounds to believe that they have made or will make available any resources, directly or indirectly, to a listed terrorist entity.²⁴ The authorization process in Bill C-41 does not provide an exception to these provisions.

- The authorization only applies to “a specified geographic area that is controlled by a terrorist group”.²⁵ Only in very limited circumstances will there be a geographic area that can be clearly defined as being controlled by a terrorist group. The rest of the time, terrorist groups may be active in an area, possibly to the extent that it affects the delivery of humanitarian aid, but NGOs may struggle to prove that a particular area is actually “controlled” by a terrorist group. As such, the authorization represents a very narrow exception that will only be useful in a limited number of circumstances.
- Religious NGOs may not be allowed to provide spiritual care. The specified purposes listed in the provisions proposed by Bill C-41²⁶ do not allow for any activities with the dual purpose of providing humanitarian aid and spiritual care to people in crisis. This may unduly restrict

²² See *Criminal Code*, *supra* note 10 at ss 83.04 and 83.19(2). For further explanation, the definition of facilitation in s 83.19(2) does not include a “knowing” requirement. This definition of “facilitation” applies in the anti-terrorism portion of the *Criminal Code* (including to s 83.04). One could read 83.19(2) in its most positive light and conclude that an individual does not need knowledge of a particular terrorist activity, thus implying that general knowledge of terrorist activities is still required. However, this is not the only way to interpret this provision. For further discussion, see Kent Roach, “The New Terrorism Offences in Canadian Criminal Law” in David Daubney et al., eds, *Terrorism, law & democracy: how is Canada changing following September 11?* (Montreal, Éditions Thémis, 2002) 114 at p. 136.

²³ See *Justice for Victims of Terrorism Act*, SC 2012, c 1, s 2, at s 4(1)(a).

²⁴ See *Charities Registration (Security Information) Act*, SC 2001, c 41, s 113 at ss 4, 5, and 13. For further details, see CBA Letter, *supra* note 8.

²⁵ Bill C-41, *supra* note 5 at s 1 (specifically at s 83.032(1)).

²⁶ *Ibid.*

the activities of religious NGOs providing humanitarian assistance where there is a secondary religious element involved in the relief work that they do.

D. CONCLUDING COMMENTS

The lengthy and complicated provisions proposed by Bill C-41 are unnecessary and overly restrictive, especially when compared with the more remedial legislation in other jurisdictions that provides a simplified approach of a blanket exemption for humanitarian aid from their criminal code provisions. For example, legislation in New Zealand clarifies that while providing material support to terrorist groups is an offence, humanitarian aid is not considered to be “material support.”

Material support excludes humanitarian support to satisfy basic needs

(5) For the purposes of this section and of any other legislation that mentions this section, material support excludes, despite paragraphs (a) and (b) of the definition of that term in section 4(1), support that does, or may do, no more than provide support necessary to satisfy basic needs of those to whom, or for whose benefit, it is provided—

- (a) in good faith for genuine humanitarian reasons; and
- (b) impartially or neutrally as between people who have those needs.²⁷

Similarly, US General License No. 19 (which was issued in December 2021), provides a general exemption for NGOs to engage in activities to support humanitarian projects, human rights projects, and education (among other activities) in Afghanistan.²⁸ These approaches by the US and New Zealand avoid the concerns listed above regarding significant government discretion and very narrow exceptions. They also provide a perspective of alternative ways to achieve the goal of helping Canadian NGOs provide humanitarian aid to those who need it in a timely and efficient manner.

The examples of general exemption protocols adopted in New Zealand and the US have worked very well in those countries and should be seriously considered for adoption in Canada. If that is not possible for

²⁷ (New Zealand) *Terrorism Suppression Act 2002*, 2002 No 34, at s 8(5). Online at: https://www.legislation.govt.nz/act/public/2002/0034/latest/DLM152710.html?search=sw_096be8ed81bb09ed_humanitarian_25_se&p=1&sr=0.

²⁸ (United States) Department of the Treasury, Office of Foreign Assets Control, General License No. 19 “Certain Transactions in Support of Nongovernmental Organizations’ Activities in Afghanistan” (22 December 2021), online: https://home.treasury.gov/system/files/126/ct_g119.pdf.

whatever reason, then at the very least the overly onerous process and the lack of scope of Bill C-41 referenced above need to be addressed.

All parties involved hope to see legislation adopted in a timely manner that will address the legal challenges faced by NGOs who wish to provide humanitarian aid in Afghanistan without contravening criminal anti-terrorism financing provisions. Nevertheless, it is hoped that Parliament will give serious consideration to the long-term impact of Bill C-41 so that the concerns being raised by some voices in the sector, as well as those raised in this Alert concerning Bill C-41 can be addressed during committee study of the legislation before it is passed in Parliament and receives Royal Assent.



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