

## AMENDMENTS TO BILL C-41 FACILITATE DISTRIBUTION OF HUMANITARIAN AID, BUT ISSUES REMAIN

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### A. INTRODUCTION AND BACKGROUND

After significant advocacy from Canadian non-governmental organizations (“NGOs”) and the broader charitable sector, the federal government has adopted legislation to amend the anti-terrorist financing provisions in section 83.03 of the *Criminal Code* so that Canadian charities may provide humanitarian aid and other assistance to those in need. Bill C-41 “An Act to amend the Criminal Code and to make consequential amendments to other Acts” received Royal Assent on June 20, 2023, and both amends section 83.03 of the *Criminal Code* to provide a blanket exception allowing “humanitarian assistance activities”, as well as introducing additional provisions relating to when organizations may apply for an authorization to carry out certain activities in a geographic area controlled by a terrorist group and processes related to this authorization.<sup>1</sup>

As explained in greater detail in *AML/ATF and Charity Law Alert No. 51*,<sup>2</sup> following the Taliban’s return to power in Afghanistan in August 2021, Canadian NGOs were prohibited from providing aid to the people

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<sup>1</sup> Bill C-41, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, 1st Sess, 44th Parl, 2023 (Royal Assent 20 June 2023) [“Bill C-41”].

<sup>2</sup> Terrance S. Carter et al, “Humanitarian Aid Authorization Proposed in Bill C-41” *AML/ATF and Charity Law Alert No. 51* (30 March 2023), online: *Carters Professional Corporation* <[https://www.carters.ca/index.php?page\\_id=3127](https://www.carters.ca/index.php?page_id=3127)> [“Alert No. 51”].

in Afghanistan due to restrictions under Canada’s overly broad anti-terrorist legislation. Therefore, Canadian NGOs and the broader charitable sector advocated for changes to this legislation so that aid could reach those in need.<sup>3</sup> In response, the Minister of Public Safety introduced Bill C-41, in the House of Commons on March 9, 2023.<sup>4</sup> 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.”<sup>5</sup>

This Bulletin outlines some of the key changes made to Bill C-41 in its third reading in the House of Commons which have now received Royal Assent and sets out ongoing issues with anti-terrorist financing legislation that the charitable sector and the federal government should consider going forward.

## B. KEY CHANGES

Some significant changes were made to the content of Bill C-41 after it received first reading in the House of Commons. The original content of the bill is described in *AML/ATF and Charity Law Alert No. 51*.<sup>6</sup> The version of the Bill that was passed at third reading in the House of Commons (and which ultimately received Royal Assent) contained the following (non-exhaustive list of) changes:

- The offence in Section 83.03 of the *Criminal Code* for making available property or financial or other related services for the purpose of benefiting any person facilitating a terrorist activity or knowing that part of these resources will benefit a terrorist group has been amended to include a *mens rea* requirement – such that it must now be shown that a person must “wilfully and without lawful justification or excuse” decide to engage in such activities.

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<sup>3</sup> 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](http://aidforafghanistan.ca)>.

See also 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>> and Canadian Bar Association, Letter to Randeep Sarai, M.P., (4 May 2023) online: *The Canadian Bar Association* <<https://www.cba.org/CMSPages/GetFile.aspx?guid=0cee97a3-10cc-4ac5-ac8a-f0d9a2c6ec24>> [“2023 CBA Letter”].

<sup>4</sup> Bill C-41, *supra* note 1.

<sup>5</sup> 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>>.

<sup>6</sup> Alert No. 51, *supra* note 2.

- There is now a blanket exception to the offence in Section 83.03 such that it does not apply to a person whose sole purpose was to carry out “humanitarian assistance activities conducted under the auspices of impartial humanitarian organizations in accordance with international law”, if reasonable efforts are also used to minimize any benefit to terrorist groups. However, there are concerns about the limited scope of this exemption as explained below.
- The Public Safety Minister is now required in subsection 83.032(2.1) to provide information in writing to a requesting eligible person or organization about whether a given geographic area requires that they have an authorization to carry out activities there.
- Government entities that assist the Public Safety Minister in the administration and enforcement of the authorization regime by collecting and disclosing information can only collect or disclose this information for the purposes of the authorization process, as per subsection 83.038(2).
- According to the new subsections 83.0392(1.1) and (1.2), the required annual report from the Public Safety Minister about the operations of the authorization regime must – if it contains any redactions – be provided in unredacted form to the National Security and Intelligence Committee of Parliamentarians, as well as the National Security and Intelligence Review Agency.

## C. ISSUES STILL TO CONSIDER

Overall, the changes made to Bill C-41 are a noticeable improvement over the earlier version of the legislation that received first reading in the House of Commons. In particular, it is encouraging to see that Canadian charities and NGOs that wish to solely carry out humanitarian assistance activities will not be subject to the onerous (and potentially lengthy) authorization process set out in sections 83.031-83.0391 of the *Criminal Code* if they otherwise meet the requirements of subsection 83.03(4) of the Code. However, the requirements in subsection 83.03(4) are not at all clear. For example, it is not clear what it means to carry out humanitarian assistance “under the auspices of impartial humanitarian organizations”, which groups will be considered to be “impartial humanitarian organizations”, and who will make such determinations for the purposes of the *Criminal Code*. It is also not clear what the Public Safety Minister will consider to be “reasonable efforts to minimize any benefit to terrorist groups”. For example, there were concerns expressed that NGOs with employees in Afghanistan would be offside anti-terrorist

financing provisions if they remitted taxes to the Taliban that is the *de facto* government. With Bill C-41 receiving Royal Assent, will organizations now need to take steps to minimize their tax burden in order show such “reasonable efforts”?

While the version of Bill C-41 that received Royal Assent introduced improvements to the legislation, many of the concerns from earlier versions of the Bill remain unaddressed. As stated in *AML/ATF and Charity Law Alert No. 51*<sup>7</sup>, which considered the text of Bill C-41 from its first reading in the House of Commons, the legislation remains so lengthy and complex that a comprehensive explanation of all of the concerns posed by this legislation is well beyond the scope of this Alert and would require pages of detailed analysis. Several of the overarching concerns raised in our earlier Alert remain relevant, including how the process to apply for an authorization (*e.g.* to be permitted to provide health or education services or programs to protect human rights) is discretionary and an authorization can be withheld or revoked without providing reasons to the applicant organization.<sup>8</sup> Further, as also stated in *AML/ATF and Charity Law Alert No. 51*, Bill C-41 is too narrow in scope, as it does not address anti-terrorist financing provisions in other pieces of Canadian legislation that charities must still comply with, nor does it allow for any activities outside of those specifically listed in the legislation. There also remain concerns about the possibility of the government exercising undue caution with regard to applications for authorizations from minority groups, such as from Muslim humanitarian organizations.<sup>9</sup>

In light of these unaddressed concerns and Canada’s overly-broad and vague anti-terrorism financing legislative regime, Bill C-41 represents a first step towards improving conditions for charities and NGOs that do important work on behalf of some of the world’s most vulnerable people. However, going forward it is imperative that the Federal Government adopt well thought out and carefully considered legislation that would ensure Canada can meet its obligations to prevent terrorist financing but also its humanitarian obligations in crisis situations.

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* at p. 5-6.

<sup>9</sup> “Bill C-41: Changes to Anti-Terror Laws a Step Forward on Humanitarian Aid, but Leave Other Forms of Vital International Assistance Behind” (23 June 2023), online: *International Civil Liberties Monitoring Group* <<https://iclmg.ca/bill-c-41-changes-to-anti-terror-laws-a-step-forward-on-humanitarian-aid-but-leaves-other-forms-of-vital-international-assistance-behind/>>. See also 2023 CBA Letter, *supra* note 3.

To date, the speed with which anti-terrorism legislation has been adopted in Canada (including Bill C-41) has not allowed for the comprehensive and thoughtful discussion necessary to ensure the legislation minimally encroaches on human rights.<sup>10</sup> According to the United Nations' Special Rapporteurs on the situation of human rights defenders and rights to freedom of peaceful assembly and of association, most national counter-terrorism laws are "exceptional in nature, produced in short and rushed timeframes, and open dialogue, debate and participation by multiple stakeholders including civil society is exceedingly rare".<sup>11</sup> This exceptionality "is consistently co-related with severe and systematic human rights violations".<sup>12</sup> Therefore, the Federal Government should engage in a comprehensive review of its anti-terrorist financing provisions and how these affect the provision of humanitarian aid, so as to adopt better legislation in advance of the next crisis, rather than as a significantly delayed response to a crisis that arises, as was the case with Bill C-41 (the Bill was adopted 22 months after the Taliban regained control in Afghanistan and the related humanitarian crises unfolded). This review could be included as part of the Federal Government's recently announced consultation process for the upcoming 2024 Federal Budget with one of its key focus being "Combatting Money Laundering and Terrorist Financing".<sup>13</sup>

In reviewing its anti-terrorist financing legislative regime, the Federal Government should aim to adopt a transparent and precise regime which clearly sets out what anti-terrorist financing is and when this will be an offence. Continuing to rely predominantly on executive powers to regulate terrorism (as Bill C-41 does with its significant dependence on the discretion of the Public Safety Minister) has been shown to heighten

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<sup>10</sup> The current section 83.03 of the *Criminal Code* was implemented in 2001 by Bill C-36, "An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act" (1st Sess, 37th Parl) which received Royal Assent a mere 64 days after the Bill was introduced in the House of Commons. Bill C-41 received Royal Assent 103 days after its first reading in the House of Commons. By way of comparison, Bill S-4 "An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)" (1st Sess, 44th Parl), which occurred in the context of a global public health emergency and among other things, amended the *Criminal Code* relating to the use of electronic means for various processes related to criminal trials, took 308 days to receive Royal Assent. As another comparison, Bill S-223 "An Act to amend the Criminal Code and the Immigration and Refugee Protection Act (trafficking in human organs)" (1st Sess, 44th Parl), which made it an offence to traffic in human organs and which is significantly shorter than the text of Bill C-41, took 385 days to receive Royal Assent.

<sup>11</sup> Mary Lawlor, United Nations Special Rapporteur on the situation of human rights defenders & Clément Nyaletsossi Voule, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, "Global Study on the Impact of Counter-Terrorism on Civil Society & Civic Space" (June 2023), online: *United Nations Human Rights Special Procedures* <[https://unglobalstudy.wengine.com/wp-content/uploads/2023/06/SRCT\\_GlobalStudy.pdf](https://unglobalstudy.wengine.com/wp-content/uploads/2023/06/SRCT_GlobalStudy.pdf)> at p. 39.

<sup>12</sup> *Ibid* at p. 40.

<sup>13</sup> "Consultation on Strengthening Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime" (9 June 2023), online: *Government of Canada* <<https://www.canada.ca/en/departement-finance/programmes/consultations/2023/strengthening-canada-anti-money-laundering-and-anti-terrorist-financing-regime/consultation-on-strengthening-canadas-anti-money-laundering-anti-terrorist-financing-regime.html>>.

harms to civil society, “as judicial safeguards and parliamentary process may be absolutely ineffective or discarded.”<sup>14</sup> Further, the use of vague language in such legislation “allows for abuses of [human rights] activists and dissidents” and have been shown to negatively impact marginalized individuals and groups.<sup>15</sup> For these reasons, and to avoid another situation where Canadian charities are unable to provide essential aid to those in need in a crisis because of anti-terrorist financing legislation, a thorough review and revision of this legislation is needed.

## D. CONCLUSION

The changes made to Bill C-41 are overall a positive development, and the government should be commended for listening to the voices in the charitable sector (among others) that advocated for a blanket exception so that humanitarian aid may be provided to those who need it most, particularly the people of Afghanistan. Nevertheless, Bill C-41 is lengthy and complex, and still contains several concerning provisions. More broadly, Canada’s anti-terrorism financing legislation needs a comprehensive and thoughtful review, which should be conducted before another crisis occurs, such as the one in Afghanistan which ultimately led to the adoption of Bill C-41. Bill C-41 is a first step, but many more are needed to ensure that Canadians continue to play an important role in the provision of humanitarian aid and other essential services to those in need.

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<sup>14</sup> *Supra* note 11 at p. 42-43.

<sup>15</sup> *Ibid* at p. 6, 48.