

A PRACTICAL GUIDE FOR CHARITIES AND HUMANITARIAN ORGANIZATIONS TO BILL C-41 AND THE PROVISION OF AID

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A. INTRODUCTION AND BACKGROUND

Following the Taliban's return to power in Afghanistan in August 2021, Canadian not-for-profits were prohibited from providing aid to the people in Afghanistan due to restrictions under Canada's overly broad anti-terrorist legislation. In response — and as previously reported in *AML/ATF and Charity Law Alerts No. 51 & 52*¹ — the federal government has adopted Bill C-41² to amend the anti-terrorist financing provisions in section 83.03 of the *Criminal Code* so that Canadian organizations may provide humanitarian aid and other assistance to those in need. While previous alerts have focussed on some of the issues and challenges posed by both the draft version of Bill C-41 (which was subsequently amended) and the final version adopted, this alert is intended to charities and not-for-profits with a practical overview of the processes anticipated by Bill C-41.

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¹ 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>. See also, by the same authors, "Amendments to Bill C-41 Facilitate Distribution of Humanitarian Aid, but Issues Remain" *AML/ATF and Charity Law Alert No. 51* (28 June 2023), online: *Carters Professional Corporation* <https://www.carters.ca/index.php?page_id=3145>.

² 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).

B. THE OFFENCES OF TERRORIST FINANCING IN THE CRIMINAL CODE

Subsections 83.03(1) and (2) of the *Criminal Code* (and their predecessors, subsections 83.03(a) and (b)) make it an indictable offence, liable to a term of not more than 10 years imprisonment, for any person who directly or indirectly makes available property or financial or other related services for terrorist purposes or for use by terrorist groups. As mentioned above, the language in these provisions was broad enough to include circumstances when Canadian charities and not-for-profits wished to provide humanitarian aid in Afghanistan following the return to power of the Taliban.

However, Bill C-41 modified the anti-terrorist financing offences found in subsections 83.03(1) and (2) of the Code by adding the clarification that terrorist financing activities may not be done “wilfully and without lawful justification or excuse”. This may provide additional protection to charities and not-for-profits who provide humanitarian aid with a “lawful justification”. Examples of potential lawful justifications that organizations could rely on include the two exceptions also listed in section 83.03, being (1) a blanket exception to terrorist financing offences that allows “humanitarian assistance activities”, and (2) a narrower exception for certain activities that is dependent on an organization applying for and receiving an authorization from the federal government to carry out certain activities in a geographic area controlled by a terrorist group.³ The requirements for both the blanket exception and the authorization are set out below.

C. EXCEPTION FOR HUMANITARIAN ASSISTANCE ACTIVITIES

The first exception to the offences of making available property or services for terrorist purposes or use by a terrorist group is set out in subsection 83.03(4) of the *Criminal Code*:

Exception — humanitarian assistance activities

83.03 (4) Subsections (1) and (2) do not apply to a person who carries out any of the acts referred to in those subsections for the sole purpose of carrying out humanitarian assistance activities conducted under the auspices of impartial humanitarian organizations in accordance with international law while using reasonable efforts to minimize any benefit to terrorist groups.

This exception is self-initiating and does not require a person to apply to the federal government for permission to carry out humanitarian assistance activities. Rather, a charity or not-for-profit (or other

³ *Criminal Code*, RSC 1985, c C-46, ss 83.03 (1) and (2).

person wanting to carry out such activities) must ensure that they meet the requirements set out in the legislation, or else risk facing consequences if the exception does not apply and they are accused of an offence under subsections 83.03(1) or (2). Therefore, any person or organization wishing to rely on the exception for humanitarian assistance activities must ensure it meets the following criteria from subsection 83.03(4):

1. The anticipated activities will be carried out “for the sole purpose of carrying out humanitarian assistance activities”;
2. The anticipated activities will be conducted under the auspices of “impartial humanitarian organizations”;
3. The anticipated activities will be carried out “in accordance with international law”; and
4. Reasonable efforts will be used to “minimize any benefit to terrorist groups”.⁴

While it is still unclear what certain terms mean, such as what will constitute “humanitarian assistance activities” and “impartial humanitarian organizations”, the Department of Public Safety (Canada) in a presentation given July 14, 2023, had indicated that it expects to provide a guidance document in the near future which will provide clarity on these issues.

D. EXCEPTION FOR CERTAIN ACTIVITIES WHEN AN AUTHORIZATION IS GRANTED

By far the more complicated regime for charities and not-for-profits to consider is the one established by subsection 83.03(3) of the *Criminal Code*, which provides that the offence of making property or services available for use by a terrorist group (as set out in subsection 83.03(2)) does not apply to any person who has been granted an authorization from the federal government.

⁴ *Ibid* at s 83.03 (4).

1. Eligibility Requirements

To be eligible to apply for an authorization under subsection 83.03(3) of the *Criminal Code*, there are three initial qualification requirements that must be met:

1. A person seeking an authorization must either be in Canada or be a Canadian outside of Canada (“eligible person”).⁵
2. The activity must be carried out “in a specified geographic area that is controlled by a terrorist group.” The Public Safety Minister must provide information in writing to an eligible person or organization that requests information about whether an authorization is required for a particular geographic area.⁶
3. The activity or specified class of activities must have one of the following purposes:
 - a. providing or supporting the provision of health services;
 - b. providing or supporting the provision of education services;
 - c. providing or supporting the provision of programs to assist individuals in earning a livelihood;
 - d. providing or supporting the provision of programs to promote or protect human rights;
 - e. providing or supporting the provision of services related to immigration (including services related to the resettlement of individuals and the safe passage of individuals from one geographic area to another); and

⁵ *Ibid* at ss 83.032 (1) and (4).

⁶ *Ibid* at ss 83.032 (1) and (2.1).

- f. supporting any operations of a federal minister, department, or agency that are conducted for a purpose other than the purposes set out in (a)-(e).⁷

2. Application and Authorization Process

If a person meets the eligibility requirements, then the application process would be as follows:

1. **Initial Application:** A person would apply to the Minister of Citizenship and Immigration (for any activity with the purpose of providing or supporting the provision of services related to immigration) and/or the Minister of Foreign Affairs (for any other activity with one of the purposes anticipated in the list above).⁸
2. **Referral:** The Minister of Citizenship and Immigration or the Minister of Foreign Affairs may refer the application to the Minister of Public Safety if they submit an assessment showing that they are satisfied that:
 - a. the application meets any requirements set out in the regulations under the *Criminal Code*;
 - b. the geographic area referenced in the application is controlled by a terrorist group;
 - c. the activity has one of the six permitted purposes;
 - d. the activity responds to a real and important need in that geographic area; and
 - e. the applicant is capable of administering funds and reporting on that administration in a transparent and accountable manner when there are circumstances in which a terrorist group may use or benefit from property or financial or other related services.⁹
3. **Security Review:** The Minister of Public Safety (who may be assisted by CSIS, the RCMP, the CRA and certain other government entities) will conduct a security review of the applicant and

⁷ *Ibid* at s 83.032 (1).

⁸ *Ibid* at s 83.032 (5).

⁹ *Ibid* at ss 83.032 (5), (6), and (8).

must assess the impact of granting the authorization on the financing of terrorism, considering factors including whether anyone involved in carrying out the activities described in the application has any links to a terrorist group, whether such a person has been investigated for a terrorism offence or the likelihood of any such person acting for a terrorist group.¹⁰

4. **Additional Information:** The Minister of Public Safety may request any additional information from the applicant while assessing the application.¹¹
5. **Granting of Authorization:** After reviewing an application, the Minister of Public Safety may grant an authorization subject to any terms and conditions that are required, in their opinion, if they are satisfied that:
 - a. there is no practical way to carry out the proposed activity without a risk that a terrorist group will use or benefit from the property or financial or related services, even if only in part; and
 - b. the benefits of carrying out the proposed activity outweigh this risk, taking into account the referral of the Minister of Citizenship and Immigration and/or the Minister of Foreign Affairs, the results of the security review, any measures to mitigate risk, and any other factor that the Minister of Public Safety considers appropriate.¹²
6. **Refusal of Authorization:** Any of the Ministers of Citizenship and Immigration, Foreign Affairs or Public Safety may refuse an application and give the applicant notice of same. This notice must be provided within a reasonable time.¹³ After an application is refused, the applicant may not make a new application until 30 days have passed since this notice was provided, unless the Minister who refused the application is satisfied that there has been a material change of circumstances.¹⁴

¹⁰ *Ibid* at ss 83.032(10) and 83.038(1).

¹¹ *Ibid* at s 83.032(11).

¹² *Ibid* at ss 83.032(9) and (12).

¹³ *Ibid* at s 83.033(1).

¹⁴ *Ibid* at s 83.033(2).

7. **After Authorization is Granted:** An authorization may be valid for up to five years.¹⁵ An authorization renewal may also be authorized for up to five years and may not require a referral from the Minister of Foreign Affairs or Citizenship and Immigration in certain circumstances.¹⁶ During this period of authorization, the Public Safety Minister may:
- a. conduct additional security reviews in respect of any person to whom the authorization applies and may request additional information be provided to that end (so long as the request only relates to the authorization or its renewal);¹⁷
 - b. amend an authorization, including any of its terms and conditions, unless the change would be so significant as to change its essential nature;¹⁸ and
 - c. suspend, revoke, or restrict the scope of an authorization if the applicant fails to comply with the authorization, fails to comply with reporting requirements (without reasonable excuse) or no longer meets the statutory conditions for the grant of an authorization.¹⁹
8. **Judicial Review:** If an applicant has concerns about the decisions made by the Ministers of Citizenship and Immigration, Foreign Affairs, or Public Safety, they may be able to initiate a judicial review of these decisions, though some information may not be provided to the applicant if the judge is of the opinion that the information relates to national security and related concerns.²⁰

E. CONCLUSION

Charities and not-for-profits that provide solely humanitarian assistance or conduct other activities (such as providing health and education services) in areas under the control of terrorist groups should review the new sections 83.03-83.0392 of the *Criminal Code* and become familiar with the various requirements contained therein. In particular, it is anticipated that these sections will enable Canadian organizations to provide aid in Afghanistan, something that was not possible in the years following the Taliban's return to

¹⁵ *Ibid* at s 83.032(14).

¹⁶ *Ibid* at ss 83.033(3) and 83.035(1).

¹⁷ *Ibid* at s 83.034.

¹⁸ *Ibid* at ss 83.036(1) and (2).

¹⁹ *Ibid* at s 83.037.

²⁰ *Ibid* at s 83.039.

power in that country. Aid will also be possible in other countries or geographic areas that are under the control of a terrorist group. Due to the very detailed and complex nature of this legislation, charities and not-for-profits may need to consult with legal counsel about the best ways to ensure compliance with the *Criminal Code* when providing much needed aid and assistance.



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