



May 4, 2023

Via email: just@parl.gc.ca

Randeep Serai, M.P.
Chair, Justice and Human Rights Committee
Six Floor, 131 Queen Street
Ottawa ON K1A 0A6

Dear Randeep Sarai:

Re: Bill C-41, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*

I am writing on behalf of the Canadian Bar Association's Charities and Not-for-Profit Law Section (CBA Section) in support of Bill C-41, *An act to amend the Criminal Code and to make consequential amendments to other Acts*, which was introduced on March 9, 2023. Bill C-41 amends the *Criminal Code's* anti-terrorist financing offences, among other statutes, to facilitate delivery of much needed humanitarian aid in geographic areas controlled by terrorist groups.

The CBA is a national association of over 37,000 lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section members practice in all areas of charities and not-for-profit law and in every size of practice.

We commend the Minister of Public Safety and Emergency Preparedness for responding to the humanitarian crises in Afghanistan and the calls from charitable and nongovernmental sectors (NGOs) for legislation that offers humanitarian aid and essential services without contravening anti-terrorism financing provisions.¹ In our view, there are ways to make Bill C-41 more precise and fairer.

Background: Crises in Afghanistan and Legal Barriers to Delivery of Humanitarian Aid

Following the Taliban's August 2021 return to power, the country, according to the UN Deputy Special Representative and Humanitarian Coordinator for Afghanistan, "remains the world's largest humanitarian crisis in 2023."² Unfortunately, Canadian humanitarian organizations cannot operate

¹ See, e.g., www.aidforafghanistan.ca. See also [Report of the House of Commons Special Committee on Afghanistan and Canada's Anti-Terrorism Legislation](#): (CBA: Ottawa, 2022).

² "Afghanistan still a grave humanitarian crisis, senior aid official says" (28 February 2023), [online](#): *United Nations, UN News*.

there under Canada's anti-terrorism financing laws and regulations.³ Several Canadian charities⁴ and other stakeholders⁵ urged the federal government to allow Canadian NGOs to supply aid and services to the Afghan people. These groups advocated that the federal government:

- ensure registered Canadian organizations have the clarity and assurance needed to deliver humanitarian assistance without fear of prosecution for violating Canada's anti-terrorism laws,⁶ such as by:
 - introducing a due diligence defence to *bona fide* Canadian charities that inadvertently distribute funds to a foreign entity in good faith, applicable under all acts and regulations under which a Canadian charity may be penalized.⁷
 - publishing a guarantee in accordance with section 83.24 of the *Criminal Code* that proceedings will not be commenced under subsection 83.03(b) in cases where legitimate humanitarian aid results in an incidental benefit to a terrorist group, absent any terrorist intent.⁸
 - creating an explicit humanitarian exemption to subsection 83.03(b) of the *Criminal Code*.⁹
- take legislative steps necessary to ensure that the *Criminal Code* does not unduly restrict legitimate humanitarian action,¹⁰ particularly subsection 83.03(b)¹¹ and provisions under Part II.1 of the *Criminal Code*.¹²

Bill C-41 is a response to these recommendations, namely Recommendation 4 presented by the Senate Committee on Human Rights that legislation be introduced "to create an explicit humanitarian exemption to section 83.03(b) of the *Criminal Code*."¹³

Summary of Bill C-41

Bill C-41 gives a person or organisation an Authorization to carry out certain activities in a geographic area controlled by a terrorist group. The Authorization applies to activities that would otherwise be prohibited under proposed subsection 83.03(2) of the *Criminal Code*, and encompasses humanitarian assistance, health services, education services and programs that protect human rights.

³ House of Commons, "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](#) at 36 ("Special Committee Report").

⁴ See, e.g., www.aidforafghanistan.ca.

⁵ Special Committee Report, *supra* note 3; Standing Senate Committee on Human Rights, "Interim Report on Canada's Restrictions on Humanitarian Aid to Afghanistan" (14 December 2022), [online](#), Report of the House of Commons Special Committee on Afghanistan and Canada's Anti-Terrorism Legislation, (CBA: Ottawa, 2023) [online](#).

⁶ Special Committee Report, *supra* note 5 at recommendation #10.

⁷ CBA Letter, *supra* note 5 at 6.

⁸ Senate Report, *supra* note 6 at recommendation 1.

⁹ *Ibid* at recommendation 4.

¹⁰ Special Committee Report, *supra* note 3 at recommendation #11.

¹¹ Senate Report, *supra* note 5.

¹² CBA Letter, *supra* note 5 at 6.

¹³ Senate Report, *supra* note 5 at recommendation 4.

Proposed subsection 83.03(2) (current subsection 83.03(b) of the *Criminal Code*) reads as follows:

Providing, making available, etc., property or services — use by terrorist group
 83.03 (2) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years who, directly or indirectly, collects property or provides, invites a person to provide or makes available property or financial or other related services, knowing that, in whole or part, they will be used by or will benefit a terrorist group.¹⁴

This prohibition prevents Canadian organizations from offering charitable assistance in Afghanistan without risking criminal prosecution because when they pay taxes to the *de facto* government (the Taliban), the provision applies.¹⁵ Therefore, an exception is of critical importance to Canadian NGOs. Bill C-41's authorization process to exempt certain organizations from the application of subsection 83.03(2) is a welcome first step in allowing Canadian NGOs to provide humanitarian assistance and other services to the Afghan people.

Recommended Approach to Anti-Terrorism Financing Legislation and Bill C-41

The CBA Section lauds the federal government for recognizing the importance of offering services beyond the provision of humanitarian aid, such as education services,¹⁶ proposing a judicial review process for decisions granting Authorizations,¹⁷ and mandating both annual reports and a comprehensive review within five years of enactment of sections 83.031 to 83.0391.¹⁸

In support of this practical approach, we have identified several aspects of Bill C-41 that should be reconsidered and amended:

- the parameters of Ministerial discretion in Bill C-41 need to be more clearly prescribed;
- the Authorization should be available for a more comprehensive set of circumstances;
- the process for judicial review should prioritize transparency; and
- the security review process must not perpetuate bias against minority communities.

While Bill C-41 amends anti-terrorism legislation in the short-term to offer humanitarian aid in terrorist-controlled countries like Afghanistan, in Australia, New Zealand, the United States and the United Kingdom, there is a “reasonableness” approach to anti-terrorism legislation, which we recommend. For example, while association with terrorist organizations is an offence under the Australian *Criminal Code Act 1995*, the offence does not apply if “the association is only for the purpose of providing aid of a humanitarian nature.”¹⁹ In New Zealand, material support for terrorist groups does not include support necessary to satisfy basic needs provided in good faith for genuine humanitarian reasons and offered impartially.²⁰ The United States offers a general exemption for NGOs to provide humanitarian support in Afghanistan.²¹ The United Kingdom also offers an

¹⁴ (specifically, at proposed s 83.03(2)).

¹⁵ Senate Report, *supra* note 5 at 6.

¹⁶ (specifically, at proposed s 83.032(1)).

¹⁷ (proposed s 83.039(1).)

¹⁸ (proposed s 83.0392.)

¹⁹ (Australia) *Criminal Code Act 1995*, [online](#): No. 12, 1995, vol 1, at s 102.8, see esp 102.8(4)(c).

²⁰ (New Zealand) *Terrorism Suppression Act 2002*, [online](#): 2002 No 34, at s 8(5).

²¹ (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](#).

exception to certain provisions in its sanctions against Afghanistan that otherwise prevent making funds available to a “designated person”, stating that these provisions:

are not contravened by a person (“P”) carrying out a relevant activity which is necessary— (a) to ensure the timely delivery of humanitarian assistance in Afghanistan, or (b) to carry out other activities that support basic human needs in Afghanistan, provided that P believes that carrying out the relevant activity is so necessary and there is no reasonable cause for P to suspect otherwise.²²

The CBA Section recommends that the federal government adopt a similar legislative approach and offer a blanket exemption for humanitarian activities that support basic needs without subjecting NGOs to an onerous application process. If this approach is not feasible in the short-term, the CBA Section recommends in the alternative the following amendments to Bill C-41:

1. Ministerial Discretion Should be More Clearly Prescribed

Subsection 83.032(9) of the *Criminal Code* states that the Minister *may* grant an Authorization to an organization to provide humanitarian aid or other activities in areas controlled by terrorists when two conditions are fulfilled. First, the Minister must be satisfied that there is no less-risky way to perform the proposed activity. Second, the proposed activity’s benefits must outweigh a terrorist group’s risk of benefiting from the property or service. In weighing the benefits and risks, the Minister considers referrals from the Minister of Foreign Affairs, security reviews, risk mitigation measures, and any other factor they consider appropriate.²³

Allowing this broad Ministerial discretion can negatively affect Canadian registered charities’ abilities to offer charitable assistance to those in most need, such as the Afghan people who are living through the world’s largest humanitarian crisis.²⁴ Broad Ministerial discretion could have the following consequences:

- It is not clear to charities which benefits the Minister will prioritize and which risks are deemed too high to allow them to provide humanitarian aid.
- Organizations may feel ill-equipped to supply all necessary information to the Minister when it is not clear to them which other factors the Minister might consider.
- None of the factors the Minister can consider in weighing benefits and risks are necessarily factors the applicant organizations can offer input about.
- Depending on the number of factors and details the Minister wishes to consider, an organization’s activities can be unduly delayed.

The CBA Section recommends that the language in subsection 83.032(9) be amended so it is clear which factors the Minister considers to be a benefit, as currently only risk factors are explained. Further, we recommend that the risk/benefit analysis in the subsection offer an objective framework to make decisions about granting an Authorization, rather than relying on the Minister’s discretionary analysis.

²² (United Kingdom) *The Afghanistan (Sanctions) (EU Exit) (Amendment) Regulations 2022*, [online](#): 2022 No. 65, Reg 2, at s 25A.

²³ (proposed s 83.03(9)(b)(iv)).

²⁴ According to the UN Deputy Special Representative and Humanitarian Coordinator for Afghanistan, Afghanistan remains the largest humanitarian crisis of 2023. See UN News, *supra* note 1.

2. Authorizations Should be Available in a More Comprehensive Set of Circumstances

The Authorization only reassures charities that subsection 83.03(2) will not apply to them. However, it does not assure them that they will be shielded from various other penalties and legislative provisions that could apply to them, including:

- other anti-terrorism provisions under Part II.1 of the *Criminal Code*, including charges about facilitating terrorism;²⁵
- other anti-terrorism financing limitations and penalties listed in regulations under the *United Nations Act* (e.g. *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida* (SOR/99-444));²⁶
- potential revocation of registered charitable status under the *Charities Registration (Security Information) Act*;²⁷ or
- liability for loss or damages under the *Justice for Victims of Terrorism Act*.²⁸

In addition, Bill C-41's Authorization is only for activities that an eligible person carries out "in a specified geographic area that is controlled by a terrorist group."²⁹ An area is controlled by a terrorist group if they exert "sufficient influence" over the area, such that activities involving property, financial or other related services "could reasonably be expected to result in the terrorist group using or benefiting from the property or services, in whole or in part."³⁰ The CBA Section is concerned that this geographic control provision is too onerous to allow NGOs to supply humanitarian aid in high conflict areas. For example, an NGO may struggle to demonstrate that a terrorist group controls an area during its involvement in that location. Or a terrorist group may control a particular area, but it may be difficult to give evidence of it. Concerns about a terrorist group's control can be addressed under proposed subsection 83.032(9) when a determination is being made to grant an NGO an Authorization, and that it is therefore not necessary to include references to "a specified geographic area that is controlled by a terrorist group" in Bill C-41.

The CBA Section recommends that the Authorization grant an exception to all legislation that imposes a penalty on organizations offering humanitarian aid or other related services, or at the very least, to the entirety of Part II.1 of the *Criminal Code*. We further recommend removing the reference to a specific geographic area controlled by a terrorist group because it is too difficult to reasonably comply with it and there are other more appropriate checks and balances built into Bill C-41.

²⁵ See e.g. *Criminal Code*, RSC 1985, c C-46, s 83.19(2). See also CBA Letter, *supra* note 1 at n 12. It is possible that the definition of "facilitation" in Part II.1 of the Code could be broad enough to include humanitarian activities. 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 136.

²⁶ *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida*, SOR/99-444: [online](#), RSC 1985, c-46, SC 2001, c 41, s 113. Note an application for an exemption is possible under this regulation, but would represent extra administrative obligations for the charity to comply with.

²⁷ *Charities Registration (Security Information) Act*, [online](#): SC 2001, c 41, s 113.

²⁸ *Justice for Victims of Terrorism Act*: [online](#), SC 2012, c 1, s 2, at s 4(1)(a). See also Terrance S. Carter et al, "Humanitarian Aid Authorization Proposed in Bill C-41" (30 March 2023), [online](#): *Carters Professional Corporation*.

²⁹ (specifically, at proposed s 83.032(1)).

³⁰ (proposed s 83.032(2)).

3. Judicial Review should Prioritize Transparency

Bill C-41's judicial review provisions at section 83.039 of the *Criminal Code* would deprive persons of procedural fairness where there are national security concerns or where the safety of any person could be endangered. The section states that a judge must hear submissions on evidence or other information "in the absence of public and of the applicant and their counsel" when both of the following conditions are satisfied:

(1) the Public Safety Minister, Minister of Foreign Affairs or Minister of Citizenship and Immigration request the judge to do so, and

(2) the judge is 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."³¹

Further, the judge cannot give the applicant an evidence summary or other details that informed the relevant Minister's decision when condition (2) is satisfied.³² Even if the applicant is unaware of this disclosure, and therefore has not responded, the judge must base their decision on all available evidence.

This judicial review process may unnecessarily deprive procedural fairness rights where it merely needs to be shown that a risk "could" exist. The CBA Section recommends the phrase "*could/would* be injurious to international relations, national defence, or national security or *could/would* endanger the safety of any person" in paragraphs 83.039(2)(a), (b), and (c) be replaced with a narrower provision that states "*is reasonably likely* to be injurious to international relations, national defence or national security or *is reasonably likely* to endanger the safety of any person"

4. Security Review Process Must Not Perpetuate Bias

The CBA Section has strong reservations about subsection 83.032(10)(b) which states that the Minister may consider "the likelihood that the applicant or any person who is to be involved in carrying out that activity will be acting for the benefit of, at the direction of or in association with a terrorist group in carrying out the activity." Any decision maker that determines the likelihood of a future event requires a significant data set to make an informed decision, and even then, can only make informed guesses. It is not clear how this analysis protects against bias since there are no listed objective criteria on which to base a decision.

Given ongoing concerns about a "whole-of-government policy that can be used to suspect Muslim-led charities as especially vulnerable to terrorist financing,"³³ and ongoing reviews into the decision making of other government bodies such as the Review and Analysis Division of the Canada Revenue Agency,³⁴ the CBA Section recommends that subsection 83.032(10)(b) be removed in its entirety.

³¹ (proposed s 83.039(2)(a)).

³² (proposed s 83.039(2)(c)).

³³ Anver Emon & Nadia Z. Hasan, "Under Layered Suspicion: A Review of CRA Audits of Muslim-Led Charities" (2021) [online](#).

³⁴ Letter from John Davies, Executive Director of the National Security and Intelligence Review Agency, to Bob Hamilton, Commissioner of Revenue and Chief Executive Officer of the Canada Revenue Agency (8 March 2023) regarding Notification of NSIRA's Review of CRA's Review and Analysis Division (RAD), [online](#).

Conclusion

A Canadian humanitarian organization testified before the House of Common's Special Committee and "urgently called for the Government of Canada to provide clarity and assurances in relation to Canada's sanctions and anti-terrorism financing law and regulations."³⁵ The Special Committee recommended that the federal government "act immediately to ensure that registered Canadian organizations have the clarity and assurances needed ... to deliver humanitarian assistance and meet basic needs in Afghanistan."³⁶ If changes are not made to Bill C-41, Canadian organizations will not have clear and necessary assurances to give humanitarian aid and other essential services in areas of the world most desperately in need.

The CBA Section recommends that the following amendments for Bill C-41 be adopted:

- 1. The language in proposed subsection 83.032(9) should be amended so that it is clear which factors the Public Safety Minister will consider to be a benefit**
- 2. The risk/benefit analysis anticipated in the proposed subsection 83.032(9) should provide an objective framework in which decisions about granting an Authorization will be made, rather than relying on discretionary analysis from the Public Safety Minister.**
- 3. The Authorization grant an exception to all legislation that could impose a penalty on organizations providing humanitarian aid or other related services.**
 - a. In the alternative, the Authorization should grant an exception to the entirety of Part II.1 of the *Criminal Code*.**
- 4. Reference to "in a specified geographic area that is controlled by a terrorist group" should be removed**
- 5. The phrase "*could/would* be injurious to international relations, national defence, or national security or *could/would* endanger the safety of any person" in paragraphs 83.039(2)(a), (b), and (c) should be replaced with a narrower provision that states "is reasonably likely to be injurious to international relations, national defence or national security or *is reasonably likely to* endanger the safety of any person".**
- 6. Paragraph 83.032(10)(b) should be removed.**

We encourage you to adopt the Bill with our suggested amendments.

Yours truly,

(original letter signed by Julie Terrien for Kate Bake-Paterson)

Kate Bake-Paterson
Chair, Charities and Not-for-Profit Law Section

³⁵ Special Committee Report, *supra* note 5 at 36.

³⁶ *Ibid* at 44, recommendation #10.