



THE CANADIAN
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July 22, 2022

Via email: mcu@justice.gc.ca; marco.mendicino@parl.gc.ca

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

The Honourable Marco Mendicino, P.C., M.P.
Minister of Public Safety
269 Laurier Avenue West
Ottawa ON K1A 0P8

Dear Ministers Lametti and Mendicino:

Re: Report of the House of Commons Special Committee on Afghanistan and Canada's Anti-Terrorism Legislation

I am writing on behalf of the Canadian Bar Association's Charities and Not-for-Profit Law Section (CBA Section) to convey our support for the recent report of the House of Commons Special Committee on Afghanistan, "Honouring Canada's Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety"¹ (Special Committee Report), as it addresses anti-terrorism legislation and the delivery of humanitarian aid abroad.

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.

Notwithstanding a strong desire and an urgent need for Canadian charities to operate in Afghanistan, Canada's anti-terrorism financing legislation prevents them from effectively carrying out many essential activities. Anti-terrorism financing legislation has, for years, been an impediment to the timely delivery of humanitarian aid by Canadian charities in certain regions. Charities should be empowered to offer timely humanitarian aid within the scope of a reasonable legislative regime. The CBA Section supports and endorses the Special Committee Report, particularly recommendations 9, 10 and 11:

9. That the Government of Canada act immediately to implement United Nations Security Council Resolution 2615.

¹ 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](#).

10. That the Government of Canada act immediately to ensure that registered Canadian organizations have the clarity and assurances needed – such as carve-outs or exemptions to deliver humanitarian assistance and meet basic needs in Afghanistan without fear of prosecution for violating Canada’s anti-terrorism laws.
11. That the Government of Canada review the anti-terrorism financing provisions under the *Criminal Code* and urgently take any legislative steps necessary to ensure those provisions do not unduly restrict legitimate humanitarian action that complies with international humanitarian principles and law.²

The CBA Section is encouraged by the House of Commons’ initiative to complete this Report and offers additional recommendations to assist the federal government in adopting a legal framework that facilitates the delivery of humanitarian aid by Canadian organizations in Afghanistan and elsewhere.

The Crises in Afghanistan

As summarized in the Report, on August 15, 2021, the Afghan government and security forces collapsed and the Taliban returned to power via military force.³ This collapse triggered the devastating suspension of international assistance to the country which was already heavily dependent on foreign aid.⁴ While hardships existed in Afghanistan prior to August 2021, the needs intensified significantly following the Taliban’s return to power, with women and children being disproportionately affected.⁵ Witnesses to the Special Committee testified that millions of people in Afghanistan “stand at the precipice of inhumane hunger and destitution” with approximately a million children “at risk of perishing this year from acute malnutrition.”⁶

Legal Barriers to Delivery of Humanitarian Aid by Canadian Organizations

In response to immense needs in Afghanistan, the Canadian humanitarian organizations who testified before the Special Committee “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” noting that otherwise “they cannot operate in Afghanistan.”⁷ Much of the uncertainty faced by these organizations is the direct result of Canada’s anti-terrorism financing legislation, such as *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da’esh) and Al-Qaida*, SOR/99-444; Part II.1 of the *Criminal Code* and the *Charities Registration (Security Information) Act*.⁸

² Special Committee Report, *Ibid*, at 3 and again at 44.

³ Special Committee Report, *supra* note 1 at 9.

⁴ Foreign aid was responsible for around 45% of Afghanistan’s GDP in 2020. “Afghanistan Development Update, April 2022: Towards Economic Stabilization and Recovery” (April 2022), [online](#) (pdf): *The World Bank*.

⁵ Special Committee Report, *supra* note 1 at 28. See also Special Committee on Afghanistan, Evidence, (14 February 2022) at 1835. (Witness: Asma Faizi, President, Afghan Women’s Organization Refugee and Immigrant Services).

⁶ Special Committee Report, *supra* note 1 at 30. See also Special Committee on Afghanistan, Evidence, (31 January 2022) at 1900. (Witness: John Aylieff, Regional Director, Asia and the Pacific, World Food Programme).

⁷ Special Committee Report, *supra* note 1 at 36.

⁸ *Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da’esh) and Al-Qaida*, SOR/99-444: [online](#), R.S.C. 1985, c-46, SC 2001, c 41, s 113.

Under section 2 of SOR/99-444, a person, such as a humanitarian organization, is prohibited from knowingly providing any property or financial services to or for the benefit of any person or entity associated with the Taliban. While a section 2 exemption is anticipated, the Canadian Red Cross told the Special Committee that the exemption does not “specifically concern humanitarian action,” and the application process is lengthy, with uncertain outcomes.⁹ Even if an exemption were granted, it would only apply to SOR/99-444 and not activities caught by other legislation, such as the *Criminal Code*.

Under subsection 83.03(b) of the *Criminal Code*, a person may be guilty of an indictable offence if they directly or indirectly collect property, provide or invite a person to provide, or make 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.”¹⁰ Under section 83.04 of the *Code*, it is an offence if an organization directly or indirectly uses property in whole or in part for the purpose of facilitating a terrorist activity.¹¹ This can potentially include instances where a charitable organization does not know that terrorist activity was being facilitated, where terrorist activity was not foreseen or planned at the time of facilitation and even where no terrorist activity was actually carried out.¹²

Charities can face significant penalties under Canada’s anti-terrorism financing provisions. For example, subsection 83.03(b) and section 83.04 of the *Criminal Code* both carry a maximum penalty of up to ten years imprisonment. Charities can also face potential revocation of their registered charitable status if there are reasonable grounds to believe that they have made, are making, or will make available any resources, directly or indirectly, to a listed terrorist entity, if a certificate (effective for up to seven years) is issued under sections 4, 5 and 13 of the *Charities Registration (Security Information) Act*.

Legal Barriers Limit Humanitarian Organizations’ Activities in Afghanistan and Elsewhere

Humanitarian organizations appearing before the Special Committee shared that Global Affairs Canada’s initial interpretation was that the *Criminal Code* prohibits them from using any Canadian funding to directly or indirectly pay ordinary or incidental taxes linked to humanitarian work, such as taxes that would be levied on rent, salaries, vendors or imports.¹³ Canadian humanitarian organizations responded that not paying taxes in Afghanistan would significantly increase the risks they face in the country and impede their ability to operate there.¹⁴ Charities trying to comply with Canada’s anti-terrorism legislation

⁹ Canadian Red Cross, “Submission to the Standing Committee on Afghanistan (AFGH)” (17 February 2022) [online](#) (pdf) at 3. See also Special Committee Report, *supra* note 1 at 38.

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

¹¹ *Ibid* at s 83.04.

¹² *Ibid* at s 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.

¹³ This is because these taxes would be paid to the Taliban, a listed terrorist entity as per *Regulations Establishing a List of Entities*, SOR/2002-284. See Action Against Hunger Canada; Canadian Foodgrains Bank; Canadian Red Cross; CARE Canada; Cooperation Canada; Human Concern International; Islamic Relief Canada; Presbyterian World Service & Development; Save the Children Canada; World Vision Canada “Canadian Humanitarian Organizations’ Submission to the Special Committee on Afghanistan” (7 February 2022) [online](#) (pdf). See also Special Committee Report, *supra* note 1 at 39.

¹⁴ Special Committee Report, *supra* note 1 at 39-40.

have the difficult choice of continuing to operate in the country without paying taxes at great risk to their staff or to stop operating in Afghanistan altogether.

Even in situations where taxes are not an issue, a consequence of Canada’s complex and extensive anti-terrorism legislation is that it is difficult for Canadian charities to promptly respond to time-sensitive emergencies (such as the June 22, 2022, earthquake in Afghanistan) while ensuring that they do not unwittingly facilitate or support terrorist activities.¹⁵

Canada’s Anti-Terrorism Legislation is Inconsistent with International Practices

Complying with Canada’s anti-terrorism financing regime is challenging for Canadian humanitarian organizations, and it is also inconsistent with international humanitarian practices. For example, Canada’s actions have been “out of step” with the United Nations Security Council’s Resolution 2615 that declared that “humanitarian assistance and other activities that support basic human needs in Afghanistan” do not violate the UN’s sanctions regime against the Taliban.¹⁶

While other countries, such as the United States, have issued General Licenses to allow continuance of humanitarian aid in Afghanistan after the Taliban’s return, no exemption has been adopted into Canadian law.¹⁷ The Special Committee heard that Canada “is the only significant donor/funder, sovereign funder, to Afghanistan that has not provided some form of exemption” that would enable humanitarian organizations to operate without fear of the application of anti-terrorism financing rules.¹⁸

Past CBA Recommendations Could be Implemented

Timely adoption of past CBA Section recommendations to improve anti-terrorism financing legislation could assist the federal government and Canadian charities in supporting humanitarian efforts both in Afghanistan and elsewhere. We summarize these recommendations here.

2001

When the *Anti-Terrorism Act*¹⁹ (Bill C-36) was introduced in October 2021, the CBA warned that several sections of the *Criminal Code*’s terrorism offences were defined too broadly and could negatively impact

¹⁵ This concern is particularly relevant when major natural disasters occur in regions that have been identified as the central operating bases of terrorist organizations. See Jane Burke-Robertson, Terrance S. Carter & Theresa L.M. Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Thomson Reuters, 2022) at §20:11.

¹⁶ [Resolution 2615 \(2021\)](#), S Res 2615 (2021), UNSCOR, at para 1. See Special Committee on Afghanistan, *Evidence*, (31 January 2022) at 2005 (Witness: Michael Messenger, President and CEO, World Vision Canada). See also Special Committee Report, *supra* note 1 at 37-38.

¹⁷ “Treasury Issues General Licenses and Guidance to Facilitate Humanitarian Assistance in Afghanistan” (24 September 2021), [online](#): *US Department of the Treasury*. See also, US, Department of the Treasury, [General License No. 14](#) “Authorizing Humanitarian Activities in Afghanistan” (24 September 2021); US Department of the Treasury, [General License No. 15](#) “Transactions Related to the Exportation or Reexportation of Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates in Afghanistan” (24 September 2021).

¹⁸ Special Committee on Afghanistan, *Evidence*, (7 February 2022) at 1910 (Witness: Barbara Grantham, President and Chief Executive Officer, CARE Canada) [7 February Evidence]. See also Report, *supra* note 1 at 40.

¹⁹ 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 and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism*, 1st Sess, 37th Parl, 2001 (assented to 18 December 2001).

legitimate activities of charities operating outside of Canada. We highlighted that anti-terrorism financing prohibitions, such as the overly broad sections of 83.02 to 83.04, could curtail fundraising on behalf of groups fighting for victims of oppressive regimes and could be applied to people who have no criminal intent.²⁰In response to the broad wording Bill C-36, the CBA recommended that the legislation “clarify that the Crown must prove criminal intent to find anyone guilty of a terrorist offence.”²¹

For the *Charities Registration (Security Information) Act* which was also enacted by Bill C-36, the CBA expressed concern that the legislation would “unnecessarily hamper the legitimate operation of Canadian charities.”²² The complex social, political and cultural structures of many foreign countries could make it onerous, if not impossible, to ensure that a Canadian charity’s funds do not end up in the hands of a terrorist entity. The charity could be denied charitable status and could face possible lawsuits from its donors, its members and any victims of the terrorist activities. The Bill should offer a due diligence defence to *bona fide* Canadian charities which may inadvertently distribute funds to a foreign entity in good faith.²³

Finally, the CBA’s 2001 letter presciently warned that Bill C-36 would “have a chilling effect on the charitable activities of Canadian charities internationally, inhibiting many Canadian charities from carrying out international operations, especially in certain volatile regions.”²⁴ The CBA recommended that the *Charities Registration (Security Information) Act* be removed from Bill C-36 in its entirety, or (in one of many suggested alternatives) that the government include a due diligence defence in section 6 of the *Charities Registration (Security Information) Act*.²⁵

2016

In December 2016, the CBA responded to the Public Safety and Justice Ministers’ study of national security in Canada in its submission: “Our Security, Our Rights: National Security Green Paper, 2016”. It reiterated many of the same concerns as the 2001 submission, namely that the language in anti-terrorism financing legislation was confusing, overly broad, difficult to comply with and could capture legitimate humanitarian activities carried on by charities. As examples of this over-breadth, the CBA highlighted sections 83.03 (providing property to terrorist groups) and 83.19 (facilitation of terrorist activity) of the *Criminal Code*.²⁶

The CBA submission repeated two recommendations first made in 2001: (1) that the federal government clarify that the Crown must prove criminal intent for terrorist offences, including those involving facilitation under subsection 83.19(2) of the *Criminal Code*; and (2) that the federal government establish a due diligence defense for charities under the *Charities Registration (Security Information) Act*.²⁷ Other recommendations asked the federal government to “create an exception for the delivery of humanitarian aid that incidentally supports a member of a terrorist group” and “develop Canadian guidelines for charities operating abroad or domestically so those charities can show due diligence in complying with anti-terrorism legislation.”²⁸

²⁰ Canadian Bar Association, “Submission on Bill C-36 *Anti-terrorism Act*” (October 2001), [online](#).

²¹ *Ibid* at 25.

²² *Ibid* at 52.

²³ *Ibid* at 54.

²⁴ *Ibid* at 55.

²⁵ *Ibid* at 57.

²⁶ Canadian Bar Association, “Our Security, Our Rights: National Security Green Paper, 2016” (December 2016), [online](#) (pdf) at 18-19.

²⁷ *Ibid* at 20.

²⁸ *Ibid*.

Recommendations

While concerns about the over-breadth and vagueness of Canada's anti-terrorism financing legislation have existed for many years, Canadian humanitarian organizations in Afghanistan are currently "running against a clock of weather, famine and malnutrition."²⁹ Therefore, the CBA Section fully and unequivocally endorses Recommendations 9-11 of the Special Committee Report, reproduced above.

The CBA Section reiterates several recommendations from its past submissions and urges the federal government to:

- clarify that the Crown must prove criminal intent to find anyone guilty of a terrorist offence under Part II.1 of the *Criminal Code*;
- reconsider the broad definition of "terrorist activity" and "facilitation" in Part II.1 of the *Criminal Code* so that legitimate activities of bona fide charities operating within and outside of Canada are not captured by these definitions;
- introduce a due diligence defence to *bona fide* Canadian charities which may inadvertently distribute funds to a foreign entity in good faith. For such a defence to be effective, it should be applicable under all of the various acts and regulations under which a Canadian charity may be penalized for the inadvertent distribution of funds to a foreign entity; and
- develop Canadian guidelines for charities operating abroad or domestically so those charities can show due diligence in complying with anti-terrorism legislation.

Thank you for considering the views of the CBA Section as you review and respond to the Special Committee Report.

Yours truly,

(original letter signed by Julie Terrien for Elizabeth Moxham)

Elizabeth Moxham
Chair, Charities and Not-for-Profit Law Section

cc. Special Committee on Afghanistan, cmteweb@parl.gc.ca

²⁹ 7 February Evidence, *supra* note 15. See also Report, *supra* note 1 at 44.