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Legislative Summary

BILL C-41:
AN ACT TO AMEND THE CRIMINAL CODE AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

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LEGISLATIVE SUMMARY OF BILL C-41: AN ACT TO AMEND THE CRIMINAL CODE AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-41, An Act to amend the Criminal Code and to make consequential amendments to other Acts, was introduced in the House of Commons on 9 March 2023 by the Honourable Marco Mendicino, Minister of Public Safety.[1] On 27 March 2023, the bill passed second reading and was referred to the House of Commons Standing Committee on Justice and Human Rights (JUST).

Bill C-41 amends the *Criminal Code* (the Code)[2] to allow Canadians to provide certain forms of assistance in areas controlled by a terrorist group, when authorized by the Minister of Public Safety. Bill C-41 sets out conditions that must be met before such authorization can be granted, including the completion of a security review.

On 31 May 2023, JUST proposed amendments to this bill. Among other changes, the committee's amendments clarify that humanitarian organizations are automatically shielded from criminal consequences for humanitarian activities conducted in good faith. Thus, specific authorization would not be required in these cases. The amendments also require the government to indicate, upon request, whether an authorization is required for a given activity.

The immediate impetus for Bill C-41 is the humanitarian situation in Afghanistan. Afghanistan has been under the control of the Taliban – a terrorist group as defined under the Code[3] – since the withdrawal of United States and North Atlantic Treaty Organization forces in August 2021. This prompted Afghanistan's exclusion from the international banking system, the freezing of its foreign reserves and the suspension of international development assistance.[4]

Current section 83.03(b) of the Code prohibits the direct or indirect provision of property or financial services "knowing that, in whole or part, they will be used by or will benefit a terrorist group."[5] As a result of this broadly framed provision, Canadian humanitarian organizations are currently unable to provide aid in Afghanistan without risk of criminal sanction, since their work could incidentally benefit the Taliban through, for example, the payment of taxes.

In December 2021, the United Nations (UN) Security Council adopted Resolution 2615, which clarified that humanitarian assistance in Afghanistan would not constitute a violation of international sanctions against the Taliban and its associated entities pursuant to UN Security Council Resolution 2255.[6] At the same time, the resolution

encouraged "reasonable efforts to minimize the accrual of any benefits, whether as a result of direct provision or diversion, to individuals or entities [such as the Taliban]."[7] This was reaffirmed and expanded upon in December 2022 by UN Security Council Resolution 2664.[8] Several countries have implemented these resolutions through amendments to their domestic legal frameworks.[9]

Despite international efforts to remove barriers to humanitarian aid, by the end of 2022, more than 90% of Afghans were suffering from some degree of food insecurity, with the number of people facing acute food insecurity expected to rise to 20 million.[10] Children and single-parent households headed by women are at disproportionate risk. Moreover, the issue of food insecurity is compounded by the broader curtailing of human rights in Afghanistan, including the systematic violation of the rights of women and girls.[11]

The UN Special Rapporteur on the situation of human rights in Afghanistan recently reported that the humanitarian crisis in Afghanistan "has been exacerbated by the unintended consequences of political cautiousness and overcompliance with sanctions, despite the humanitarian exemptions afforded by the Security Council."[12]

Bill C-41 follows UN Security Council Resolutions 2615 and 2664 as well as recent recommendations from three parliamentary committees to remove Canadian barriers to humanitarian aid in Afghanistan.[13]

2 DESCRIPTION AND ANALYSIS

Bill C-41 contains six clauses. The discussion in this section focuses on clause 1, which includes the bill's most significant amendments. These amendments are grouped by theme.

2.1 EXCEPTION TO TERRORISM FINANCING PROHIBITION WITH AUTHORIZATION

Under current section 83.03 of the Code, it is an indictable offence to provide property or services for the purpose of terrorist activity (section 83.03(a)) or "knowing that, in whole or part, they will be used by or will benefit a terrorist group" (section 83.03(b)). A "terrorist group" is defined in section 83.01(1) as an entity that facilitates or carries out terrorist activities or an entity listed by the Governor in Council pursuant to section 83.05.[14]

Clause 1 of Bill C-41 replaces current section 83.03 with new sections 83.03 to 83.0392. Under the bill, sections 83.03(a) and 83.03(b) become sections 83.03(1) and 83.03(2), with a separate heading added for section 83.03(2). This way of splitting section 83.03 emphasizes the distinction between providing property or services for the purpose of terrorist activity, and providing property or services that will benefit a terrorist group.

An exception to the latter offence is then created under new section 83.03(3) for those granted authorization to carry out specified activities under the new scheme.

The exception created by new section 83.03(3) could be used to protect authorized providers of assistance in Afghanistan from criminal liability, even if their activities incidentally benefit the Taliban. It would also be available to those seeking to provide assistance in any region controlled by a terrorist group.

JUST amended Clause 1 of Bill C-41 so that the offences in new sections 83.03(1) and 83.03(2) of the Code apply only to persons who act "willfully and without lawful justification or excuse." This amendment is intended to reflect the principle of international humanitarian law that civilian populations are lawfully entitled to receive humanitarian relief.[15]

JUST also amended clause 1 to add section 83.03(4) to the Code, which states that the offences in new sections 83.03(1) and 83.03(2) do not apply to a person acting "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 amendment is consistent with the recommendation of the Standing Senate Committee on Human Rights to create a blanket humanitarian exemption to existing section 83.03(b) of the Code to clarify "that legitimate humanitarian aid – absent any terrorist intent – that results in an incidental benefit to a terrorist group would not fall within the ambit of this provision." [16]

Witnesses who appeared before JUST during the study of Bill C-41 explained that a blanket humanitarian exemption accords with the approach taken by other jurisdictions and in international law, which protects impartial providers of humanitarian assistance.[17] However, government officials cautioned that a blanket humanitarian exemption would not cover other activities, such as education and developmental assistance.[18] These other activities are dealt with case by case through the authorization procedure set out in Bill C-41.

2.2 ELIGIBILITY CRITERIA FOR AUTHORIZATION

New sections 83.032(1) to 83.032(4) of the Code set out the key eligibility criteria for authorization under the new scheme created by section 83.03(3). Under new section 83.032(1), the Minister of Public Safety and Emergency Preparedness (public safety minister) may authorize a person to carry out specified activities "in a specified geographic area that is controlled by a terrorist group."

The activities must be for one of the listed purposes. In the first reading version of the bill, these activities include providing humanitarian assistance, health services, education services, employment programs, human rights programs and immigration

services (new sections 83.032(1)(a) to 83.032(1)(f)). Activities supporting other kinds of Canadian government operations may also be authorized (new section 83.032(1)(g)); however, no government grants or contributions may be authorized for this purpose (new section 83.032(3)). In accordance with its amendment establishing a blanket humanitarian exemption (see section 2.1 of this document above), JUST removed humanitarian assistance from the list of purposes for which activities may be authorized under new section 83.032(1).

New section 83.032(2) defines what it means for a geographic area to be controlled by a terrorist group. The group must exert sufficient influence that it could reasonably be expected to use or benefit from an activity involving property or services in the area.

JUST amended the bill to add new section 83.032(2.1), which requires the public safety minister to provide "information in writing about whether an authorization is required to carry out an activity or a class of activities in a given geographic area" when requested to do so by an eligible person or organization. This responds to the concern expressed by several witnesses who appeared before JUST that the bill puts the onus on organizations to determine whether the areas they wish to work in are controlled by a terrorist group – a difficult and highly political exercise.[19] New section 83.032(4) establishes that only Canadians or those in Canada are eligible for authorization under the scheme.

2.3 AUTHORIZATION PROCESS

There are two stages to the authorization process. First, the Minister of Citizenship and Immigration and/or the Minister of Foreign Affairs (depending on which of the listed purposes the application involves) decides whether to refer an application for authorization to the public safety minister (new section 83.032(5)). Only once an application is referred can the public safety minister conduct a security review and decide whether to grant the authorization requested. At both stages, the relevant minister may designate a person to act on their behalf (new section 83.031(2)).

Bill C-41 does not set out specific timelines for the authorization process.

2.3.1 Referral by Minister of Citizenship and Immigration and/or Minister of Foreign Affairs

The referral process is set out in new sections 83.032(5) to 83.032(8). To refer an application, the relevant minister must be satisfied that the application meets the following conditions (new section 83.032(6)):

- The application meets any regulatory requirements.
- The geographic area in question is controlled by a terrorist group.

- The proposed activity is for one of the listed purposes.
- The activity "responds to a real and important need" in the area.
- The applicant is capable of administering funds in an accountable manner.

These conditions overlap with, but are not identical to, the eligibility criteria set out in new sections 83.032(1) to 83.032(4).

If the relevant minister decides to refer the application to the public safety minister, they must provide an assessment of how these conditions are met (new section 83.032(8)).

2.3.2 Final Decision by Public Safety Minister

Once an application has been referred, the public safety minister may grant the authorization if satisfied of the following additional conditions:

- There is no practical way to carry out the proposed activity without the risk of benefiting a terrorist group (new section 83.032(9)(a)).
- The benefits of the activity outweigh the risks (new section 83.032(9)(b)).

As part of determining whether the benefits outweigh the risks, the public safety minister must consider the information provided in the referral along with any measures or conditions that may be included in the authorization to minimize the risk of benefiting a terrorist group. The public safety minister must also conduct a security review to assess the potential impact of the authorization on terrorism financing (new sections 83.032(9)(b)(ii) and 83.032(10)). New section 83.032(10) sets out a non-exhaustive list of factors that the public safety minister may consider in conducting the security review, all of which probe possible links between the applicant and terrorist groups or activities.

New section 83.032(15) sets out a further limitation on granting authorization when the proposed activity will benefit a listed entity subject to UN Security Council sanctions.[20] In this case, the activity may be authorized only if the Minister of Foreign Affairs confirms that the Security Council approved or did not intend to prohibit the activity, or that "there is no obstacle in international law." This provision would apply to activities in Afghanistan, as the Taliban is a listed entity subject to UN Security Council sanctions.

2.4 PROCEDURAL RIGHTS AND RESPONSIBILITIES

At the first stage, an application may be deemed withdrawn if the applicant fails to provide, within 60 days, missing information that has been requested (new section 83.032(7)). At the second stage, the public safety minister may

request additional information regarding the application to be provided within a specific time frame, failing which the application may be deemed withdrawn (new section 83.032(11)). Unlike in the referral process, the public safety minister is not limited to requesting only information that should have been included in the initial application.

If the decision is made to refuse an application at either stage of the authorization process, notice must be given to the applicant "within a reasonable time" (new section 83.033(1)). According to the first reading version of Bill C-41, the applicant must wait 180 days before reapplying, unless the minister who gave the notice is satisfied there has been a "material change of circumstances" (new section 83.033(2)). If the public safety minister gave the notice and is satisfied in this regard, the new application may be considered without going through the referral process described above (new section 83.033(3)). JUST amended the bill to reduce the 180-day waiting period for reapplying to 30 days.

New section 83.034 allows the public safety minister to conduct additional security reviews at any time an authorization is in effect and to request additional information from the applicant for this purpose. This would allow the government to assess and respond appropriately to changing circumstances, including any new information or allegations regarding the applicant's activities in the area. JUST amended the bill to specify that a request for additional information by the public safety minister "must relate only to the authorization or its renewal."

2.5 SCOPE OF AUTHORIZATION

The public safety minister may grant an authorization under Bill C-41 subject to any terms and conditions the minister may deem necessary (new section 83.032(12)). The authorization applies to any person involved, directly or indirectly, in carrying out the approved activity (new section 83.032(13)) and is valid for a specified period not exceeding five years (new section 83.032(14)). Upon application, the public safety minister may renew an authorization for successive periods of no more than five years at a time (new section 83.035).

The public safety minister may also amend an authorization as long as this does not "change the essential nature of the authorization" (new section 83.036). Given that the listed purposes of the activity comprise the basis for the authorization, the minister cannot amend the authorization by changing these purposes or by adding others (new section 83.036(2)).

The public safety minister may suspend, revoke or restrict the scope of a granted authorization if a person fails to comply with its terms or to provide information requested for additional security reviews under new section 83.034 (new section 83.037).

New section 83.032(16) clarifies that the *Statutory Instruments Act* does not apply to an authorization granted under Bill C-41. This ensures that authorizations are not subject to the various procedural requirements pertaining to regulations and other statutory instruments. Of particular note, this section ensures that authorizations need not be publicly accessible or subject to scrutiny by the Standing Joint Committee for the Scrutiny of Regulations.

2.6 INFORMATION SHARING

To facilitate the implementation of the authorization scheme, new section 83.038 of the Code allows for information sharing between various federal government departments, law enforcement agencies and intelligence agencies for the purposes of Bill C-41.[21] JUST amended the bill to add new sections 83.038(2) and 83.038(3), which provide some protection for information shared through this process. New section 83.038(2) clarifies that any information collected or disclosed may only be used to administer and enforce the authorization scheme created by the bill. New section 83.038(3) requires the public safety minister to take "reasonable steps" to ensure compliance with section 83.038(2).

2.7 JUDICIAL REVIEW PROCESS

A decision made by a minister at either stage of the authorization process set out in Bill C-41 may be challenged in federal court through a judicial review. New section 83.039 of the Code sets out rules to protect the confidentiality of sensitive information during the judicial review and appeal processes while still ensuring certain procedural rights for the applicant.

For instance, while the relevant minister and the applicant both have a right to be heard (new section 83.039(2)(d)), a judge must exclude the applicant and the public when hearing submissions on certain evidence if this is requested by the minister and deemed necessary to protect national security or the safety of any person (new section 83.039(2)(a)). The applicant must be "reasonably informed" of the reasons for the minister's decision via a summary of the evidence; however, this must not include any information that would harm national security or endanger any person if disclosed (new section 83.039(2)(c)). Even if a summary of certain evidence has not been provided to the applicant, the judge's decision may still be based on that evidence (new section 83.039(2)(e)).

JUST amended the bill to add new section 83.039(2)(a.1), which allows an *amicus curiae*[22] to participate in the judicial review process and to review the evidence or other information at issue.

2.8 REPORTING REQUIREMENTS

In the first reading version of Bill C-41, new section 83.0392(1) requires the public safety minister to table a report on the operation of the authorization scheme set out in the bill for each calendar year, within 180 days after 1 January. Under new section 83.0392(2), the public safety minister must undertake a comprehensive review of the new scheme within five years of its enactment, with a report to be tabled before each house of Parliament.

JUST made several amendments to the reporting requirements set out in Bill C-41. First, the bill was amended to require that the annual report be tabled within 90 days after 1 January (rather than 180 days), and that the comprehensive review of the bill be conducted within one year after its enactment (rather than five years).

JUST also added certain requirements pertaining to the content and handling of the report. New section 83.0392(1.1) requires the report to include the number of applications for authorizations made, whether approved or refused, in the previous year. Under new section 83.0392(1.2), if the report contains redactions, an unredacted version must be forwarded to both the National Security and Intelligence Committee of Parliamentarians, and the National Security and Intelligence Review Agency.

2.9 REGULATION-MAKING AUTHORITY

New section 83.0391 gives the Governor in Council the authority to make regulations regarding the authorization process as recommended by the public safety minister. The regulations may also add new entities to the list of those permitted to share information under new section 83.038.

2.10 CONSEQUENTIAL AMENDMENTS

Clauses 2 and 3 of Bill C-41 replace references to section 83.03 in the Code and the *Canada Business Corporations Act* with references to new sections 83.03(1) and 83.03(2), reflecting the split created by Bill C-41.

Clauses 4, 5 and 6 amend the *Excise Tax Act*, the *Income Tax Act* and the *Excise Act, 2001* to expressly allow government officials to share confidential taxpayer information for the purpose of security reviews conducted under the new scheme created by the bill. This amendment complements the new information-sharing provision (new section 83.038) discussed previously at section 2.6 of this legislative summary.

2.11 COMING INTO FORCE

Bill C-41 does not include any transitional provisions, nor does it indicate a coming-into-force date. Consequently, the bill comes into force on the date it receives Royal Assent.[23]

NOTES

1. Bill C-41, An Act to amend the Criminal Code and to make consequential amendments to other Acts, 44th Parliament, 1st Session. See also Public Safety Canada, *Bill C-41: An Act to amend the Criminal Code and to make consequential amendments to other Acts*, Backgrounder; and Government of Canada, *Bill C-41:* An Act to amend the Criminal Code and to make consequential amendments to other Acts – *Charter Statement*, 21 March 2023.
2. *Criminal Code*, R.S.C. 1985, c. C-46.
3. Ibid., s. 83.01(1); and Public Safety Canada, "Taliban," *Currently listed entities*.
4. United Nations (UN), Human Rights Council, "Situation of human rights in Afghanistan – Report of the Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett," *Country Reports*, 9 February 2023, p. 5.
5. *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.03(b). A violation of s. 83.03(b) is an indictable offence punishable by a term of imprisonment of up to 10 years.
6. UN Security Council, *Resolution 2255 (2015)*, 21 December 2015.
7. UN Security Council, *Resolution 2615 (2021)*, 22 December 2021.
8. UN Security Council, *Resolution 2664 (2022)*, 9 December 2022.
9. See United Kingdom, *The Sanctions (Humanitarian Exception) (Amendment) Regulations 2023*, No. 121, Regulation 6; and European Union, EUR-Lex, *Council Decision (CFSP) 2023/338 of 14 February 2023*, *Official Journal* L 47/50. Similarly, the United States (U.S.) has issued general licences under its existing legal framework. See U.S. Department of State, *Issuance of Additional General Licenses and Guidance in Support of Assistance to Afghanistan*, News release, 22 December 2021.
10. UN Human Rights Council, "Situation of human rights in Afghanistan – Report of the Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett," *Country Reports*, 9 February 2023.
11. Ibid.
12. Ibid.
13. See House of Commons, Special Committee on Afghanistan, *Honouring Canada's Legacy in Afghanistan: Responding to the Humanitarian Crisis and Helping People Reach Safety*, First report, June 2022, recommendations 9 to 11; House of Commons, Standing Committee on Foreign Affairs and International Development (FAAE), *Humanitarian Aid in Afghanistan*, Sixth report, November 2022; FAAE, *Humanitarian Aid in Afghanistan*, Twelfth report, February 2023; and Senate, Standing Committee on Human Rights (RIDR), *Interim Report on Canada's Restrictions on Humanitarian Aid to Afghanistan*, Fifth report, December 2022, Recommendations 1 to 4.
14. The Taliban is a listed entity pursuant to section 83.05. See *Regulations Establishing a List of Entities*, SOR/2002-284.
15. International Committee of the Red Cross, "Rule 55," International Humanitarian Law Databases; and House of Commons, Standing Committee on Justice and Human Rights (JUST), *Evidence*, 24 April 2023.
16. RIDR, *Interim Report on Canada's Restrictions on Humanitarian Aid to Afghanistan*, Fifth report, December 2022, Recommendation 4.
17. See, for example, JUST, *Evidence*, 19 April 2023, 1635 (Leah West, Assistant Professor, Norman Paterson School of International Affairs, Carleton University); and JUST, *Evidence*, 19 April 2023, 1640 (Joseph Belliveau, Executive Director, Doctors Without Borders).

18. JUST, *Evidence*, 17 April 2023, 1645 (Jennifer Loten, Director General, Bureau for International Crime and Terrorism, Department of Foreign Affairs, Trade and Development); and JUST, *Evidence*, 17 April 2023, 1650 (Sébastien Aubertin-Giguère, Assistant Deputy Minister, Department of Public Safety and Emergency Preparedness).

19. JUST, *Evidence*, 19 April 2023, 1630 (Jessica Davis, President, Insight Threat Intelligence); JUST, *Evidence*, 19 April 2023, 1635 (Dr. Leah West, Assistant Professor, Norman Paterson School of International Affairs, Carleton University); and JUST, *Evidence*, 19 April 2023, 1730 (Usama Khan, Chief Executive Officer, Islamic Relief Canada).

20. For more information, see UN Security Council, *United Nations Security Council Consolidated List*; and Government of Canada, *Listed Persons*.

21. The *Security of Canada Information Disclosure Act* allows federal government institutions to share information in order to carry out responsibilities "in respect of activities that undermine the security of Canada." It is not clear whether this would apply to the authorization scheme under Bill C-41. See *Security of Canada Information Disclosure Act*, S.C. 2015, c. 20, s. 2.

22. An *amicus curiae* – or "friend of the court" – is a person appointed to assist the court with its decision-making, which includes ensuring that competing views are fully argued; in some cases, the person is appointed to bring forward the interests of an affected person who has been excluded from the proceedings due to national security considerations.

23. See Kate Sinnott, "Coming into Force of Federal Legislation: A Practical Guide," *HillNotes*, Library of Parliament, 4 October 2022.