Court of Appeal No. CA040592
CA040593
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Supreme Court File No.: 25796
Supreme Court Registry: Vancouver



**COURT OF APPEAL**

ON APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE SILVERMAN OF THE SUPREME COURT OF BRITISH COLUMBIA ON THE 25TH DAY OF JANUARY 2013.

REGINA

APPELLANT

v.

FRANCIS ANTHONIMUTHU APPULONAPPA
HAMALRAJ HANDASAMY
JEYACHANDRAN KANAGARAJAH
VIGNARAJAH THEVARAJAH

RESPONDENTS

AND

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION and CANADIAN COUNSEL FOR REFUGEES

INTERVENERS

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# FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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TABLE OF CONTENTS

## OPENING STATEMENT

The central issue in this appeal is Parliament's purpose in enacting the criminal prohibition against human smuggling. The appellant Crown claims that s. 117(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as it read prior to amendment in December 2012, (the *"IRPA"*) serves several broad purposes and that, assessed in relation to these purposes, s. 117(1) of the *IRPA* is not overly broad.

However, a complete review of the legislative history of s. 117(1) of the *IRPA – i.e.* one that reaches back to the original enactment of the offence in 1988 – confirms that the application judge correctly identified the purpose of the provision. The expansive purposes claimed by the appellant are not supported by the legislative history. In fact, they represent a considerable departure from Parliament's objective at the time the provision was enacted, and thus offend the doctrine of shifting purpose.

Further, the appellant claims purposes for the impugned provision that are so broad and generic in nature as to be indeterminate in content. The Court should be reluctant to accept as statements of legislative purpose sweeping expressions of social and political values, such as those claimed in this appeal. Accepting generic values as expressions of legislative purpose risks undermining the very function of overbreadth analysis: to ensure that individual liberty is not curtailed without proper reason.

## PART 1 – STATEMENT OF FACTS

1. The Court below found that s. 117(1) of the *IRPA* is overbroad, thereby violates s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"),[1] and is not saved by s. 1. The application judge declared s. 117(1) of the *IRPA* to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*.[2] The Crown appeals.

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[1] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982* (U.K.) 1982, c. 11.

[2] See Reasons for Judgment at paras. 179 – 182, Appeal Book ("AB"), vol. 3 at 690.

2. The British Columbia Civil Liberties Association was granted leave to intervene in the appeal on June 10, 2013.

## PART 2 – ISSUES ON APPEAL

3. Is s. 117(1) of the *IRPA* an overly broad law that offends s. 7 of the *Charter*?

## PART 3 – ARGUMENT

4. It is a principle of fundamental justice that criminal legislation must not be overbroad.[3] The test for overbreadth remains as stated in *R. v. Heywood*: is the law broader than necessary to achieve a "legitimate"[4] or "justified"[5] state objective, always allowing for a measure of deference to the means selected by the legislator?[6] Overbreadth analysis involves a "balancing exercise" between the impact of the law on constitutionally protected interests and the "impact necessary for [the law] to achieve its justified legislative objectives".[7]

5. The method to scrutinize a law for overbreadth is to: (1) examine the scope of the law; (2) determine its objective; and (3) ask whether the means selected by the law are broader than necessary to achieve the legitimate state objective.[8]

### A. The scope of s. 117(1) of the *IRPA*

6. Section 117(1) of the *IRPA* provides:

> No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport, or other document required by this *Act*.

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[3] *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 at para. 35.

[4] *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792.

[5] *R. v. Levkovic*, 2013 SCC 25 at para. 9

[6] *R. v. Heywood, supra*, at 792; *R. v. Khawaja, supra*, at para. 37.

[7] *R. v. Levkovic, supra*, at para. 9.

[8] *R. v. Khawaja, supra*, at para. 40.

7. Section 117(1) is located in Part 3, among the "Enforcement" provisions of the *IRPA*. Section 117(1) is grouped with offences relating to human trafficking and disembarking persons at sea; these three offences appear under the heading "Human Smuggling and Trafficking".

8. Several courts adjudicating cases involving the smuggling of people for profit have held that the elements of the offence under s. 117(1) are: (1) the person being smuggled did not have the required documents to enter Canada; (2) the person was coming into Canada; (3) the accused was organizing, inducing, aiding, or abetting the person or persons to enter Canada; and (4) the accused had knowledge of the lack of required, necessary documents.[9] Other courts have not used the language of "smuggling" to describe the gravamen of the offence, but have described s. 117(1) as prohibiting the organizing, inducing, aiding or abetting of the "unlawful entry of persons into Canada"[10] or the "coming into Canada of illegal aliens",[11] or "the assisting of persons who do not have passports or similar documents".[12]

9. Engaging in the prohibited activity for profit or material benefit is not an element of the offence described by s. 117(1) of the *IRPA*.[13]

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[9] *R. v. Prone*, [2012] B.C.J. No. 1393; 2012 BCPC 219; *R. v. Godoy* (1996), 34 Imm.L.R. (2d) 66 (Ont. Ct. J. (Prov. Div.); *R. v. Alzehrani* (2008), 237 C.C.C. (3d) 471 (O.S.C.J.).

[10] *R. v. Chen; R. v. Guevarra,* 2004 MBCA 194 at para. 27.

[11] *B306 v. Canada (Minister of Public Safety and Emergency Preparedness*), 2012 FC 1282 at para. 34.

[12] *R. v. Alzehrani, supra,* at para. 56.

[13] *B010 v. Canada (Citizenship and Immigration)*, 2013 FCA 87 at para. 8, leave to appeal filed May 17, 2013; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1417 at para. 8.

## B. The object of s. 117(1) of the *IRPA*

10. *R. v. Big M Drug Mart Ltd.* underlined the importance of properly identifying the object of legislation in constitutional analysis:

> [C]onsideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the *Charter*. . . .[14]

11. In other words, one must scrutinize the object of an impugned provision to safeguard individual rights and freedoms.

12. The object of s. 117(1) is contested in this Court. The application judge held that the objective of s. 117 of the *IRPA* "is to stop human smuggling and to protect the victims of human smuggling in accordance with [Canada's] international obligations."[15] The appellant, in contrast, says that the law serves a constellation of purposes. The Crown begins by saying that the "true objective" of the law is "to prevent individuals from arranging unlawful entry of others into Canada".[16] However, the Crown goes on to assert other objects and purposes: "maintaining the integrity of Canada's immigration and refugee protection regime, protecting the safety of all Canadians, and promoting international justice by guarding against the uncontrolled entry into Canada of individuals who may be criminals or pose security risks"; protecting the "health" of all Canadians; controlling the security of Canada's borders and the safety and security of Canadians; "maintain[ing] control over the entry of undocumented individuals into the country"; and protecting Canada's sovereignty.[17]

13. It is now clear at law that "where divergent views on the purpose of an Act are expressed, or where the scope of the purpose is called into question, extrinsic materials such as Hansard and other government publications may be used to elucidate

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[14] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331 – 332.

[15] Reasons for Judgment at para. 138, AB, vol. 3 at 681.

[16] Appellant's factum at paras. 3 and 34.

[17] *Ibid.* at paras. 3, 34, 45, 48, 50, 53, 67, 73 and 79.

meaning".[18] The legislative history and evolution of a provision also aid in understanding its context.[19]

14. The Crown correctly points out that the offence set out at s. 117(1) of the *IRPA* was originally enacted in 1988. *An Act to Amend the Immigration Act and the Criminal Code in consequence thereof*, S.C. 1988, c. 36, s. 9 brought ss. 95.1 and 95.2 into force in the *Immigration Act,* R.S.C. 1985, c. I-2.

15. Section 95.1 of the *Immigration Act* created the offence of knowingly organizing, inducing, aiding, or abetting the coming into Canada of a person not in possession of valid documents, or attempting to do so. The penalty on indictment was a fine not exceeding $10,000 or imprisonment for up to five years, or both. On summary conviction, the penalty was a fine of up to $2,000, imprisonment for up to six months, or both.

16. Section 95.2 of the *Immigration Act* mirrored the offence in s. 95.1, but addressed the organizing, inducing, aiding or abetting the coming into Canada of a group of 10 or more persons. Section 95.2 imposed a maximum penalty on indictment of up to $500,000, or imprisonment not exceeding 10 years, or both.

17. In 1992, the fine on conviction under indictment pursuant to s. 95.1 was increased to a maximum of $100,000; the summary conviction penalty was increased to allow for a fine of up to $10,000 and up to one year's imprisonment, or both.[20]

18. With the introduction of the *IRPA* in 2001, the offences in ss. 95.1 and 95.2 of the *Immigration Act* were maintained, in combined form, in s. 117.[21] The description of the

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[18] *Application Under S. 83.28 of the Criminal Code*, 2004 SCC 42, [2004] 2 S.C.R. 248 at para. 37.

[19] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 at para. 43.

[20] *An Act to Amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, s. 84.

offence remained essentially unchanged, except that the prohibited acts now applied in respect of "one or more persons", rather than in relation to "a person" (former s. 95.1) and "a group of 10 or more persons" (former s. 95.2). The penalties were modified. Conviction on indictment for an initial offence rendered a person liable to a fine of up to $500,000 or imprisonment of up to 10 years, or both. On a subsequent indictable offence, a person became liable to a fine of up to $1 million or imprisonment of up to 14 years, or both. Summary conviction penalties included a fine of up to $100,000, imprisonment of up to two years, or both.

19. The Debates concerning the introduction of ss. 95.1 and 95.2 into the *Immigration Act* confirm that the application judge correctly identified the purpose of the provisions that eventually became s. 117(1) of the *IRPA*.

20. On second reading of the enacting legislation, in response to a number of impassioned speeches opposing ss. 95.1 and 95.2, the Minister of State for Immigration explained the intent of the provisions:

> As for our motivation, we are deeply concerned by the unscrupulous smugglers who help people come illegally into Canada. Their activity is unacceptable. Not only is it unfair to those who pay their money on the strength of false promises, but it also jeopardizes human lives.
>
> This is not only unfair to the people directly involved, but odious for all Canadians. We have to put an end to this practice and we shall do so. Experience has shown that existing penalties are not sufficiently harsh to deter smugglers.
>
> . . .
>
> The new provisions will make the activities of smugglers and merciless advisors more risky.[22]

The Minister continued,

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[21] Parliamentary Research Branch, Bill C-11: the Immigration and Refugee Protection Act by Jay Sinha and Margaret Young (Ottawa: Library of Parliament, 2002) at 36.

[22] *House of Commons Debates*, 33rd Parl., 2nd Sess., Vol. VII (12 August 1987) at 8000 (Hon. Gerry Weiner); emphasis added.

> . . . **What we are attempting to do by the specifics of this provision is to get at the organizers of clandestine movements, those that deal with the mass market of human misery**. Those are the people we want to put out of business.[23]

21. The Minister reiterated the point, after further questioning about the impact of the proposed ss. 95.1 and 95.2 on those providing humanitarian assistance to refugees:

> Mr. Speaker, I hope everybody is clearly getting the message that we abhor the trafficking in human flesh. That process must stop. Very clearly our message of deterrence is being well received.
>
> . . .
>
> We are not meaning to affect any individual who has dedicated his life and work to the real refugees of the world. However, we are going to stop this organized movement of clandestine groups who want to abuse us and take us for patsies. Canadians have said "no more", and we are speaking out loudly and clearly. Saying "no" to illegal aliens will still give us the right to say "yes" to real refugees and to do well.[24]

22. On third reading, the Minister of Employment and Immigration again articulated the object of the legislation:

> **The Bill is aimed at severely cracking down on the operations of unscrupulous counselors, smugglers who take advantage of the plight of illegal migrants** . . .
>
> Mr. Speaker, proposed Sections 95.1 and 95.2 are the key provisions of these legislative measures, enabling us as they will to put a stop to those who bring many illegal migrants to Canada.
>
> There has been much discussion about amending these articles. We have insisted that lawyers and legal drafters consider different phrases. We have considered terms such as religious group, profit, reward, fraud and clandestine entry, but each option creates loopholes and reduces our capacity to prosecute the unscrupulous. The bottom line . . . is that we cannot permit these individuals to escape sanction by creating insurmountable problems of proof.[25]

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[23] *Ibid.* at 8002; emphasis added.

[24] *Ibid.* at 8003; emphasis added.

[25] *House of Commons Debates*, 33rd Parl., 2nd Sess., Vol. VII (2 September 1987) at 8708 (Hon. Benoît Bouchard); emphasis added. See also the responding speech of the Hon. Sergio Marchi, *ibid.* at 8719 – 8720.

23. After the Senate Committee on Legal and Constitutional Affairs recommended some 20 amendments to the enacting legislation, the Minister of Employment and Immigration specifically affirmed that the legislation was not intended to target those rendering humanitarian assistance to refugees. The Minister also accepted the Committee's recommendation that the personal, written consent of the Attorney General be required for the prosecution of those "who organize illegal migration", commenting:

> This amendment adds further substance to the Government's undertaking that **a person who violates the Act in the cause of rendering needed humanitarian assistance to refugees will not be prosecuted**.[26]

24. In sum, a review of the legislative history shows that Parliament's intent in enacting the legislation was to criminalize those who materially benefit from organizing, aiding or abetting the coming into Canada of undocumented migrants. The intent of Parliament was manifestly *not* to enact legislation to prosecute those who assist refugees for humanitarian reasons. Further, there is no suggestion in the legislative history that the offence was aimed at preventing refugees without required documentation from rendering aid and assistance to one another to come into Canada.

25. Debates concerning the enactment of the *IRPA* suggest no departure from Parliament's original intent in enacting ss. 95.1 and 95.2 of the *Immigration Act*. To the contrary, on second reading of Bill C-11, *An Act respecting Immigration to Canada and the Granting of Refugee Protection to Persons Who are Displaced, Persecuted or in Danger*, the Minister of Citizenship and Immigration noted the introduction of new and stronger penalties, but no new purpose in respect of the offence:

> Bill C-11 remains a tough bill. However, I want to emphasize that it is tough on criminal abuse of our immigration and refugee protection systems. The bill creates severe new penalties for people smugglers and those caught trafficking in humans. These are deplorable activities. There will be fines of up to $1 million and sentences of up to life in prison for persons convicted of smuggling and trafficking in humans. It will also allow our courts to order the forfeiture of money and other property seized from traffickers.[27]

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[26] *Ibid.* and at 12300; emphasis added.

[27] *House of Commons Debates*, 37th Parl., 1st Sess., No. 21 (26 February 2001) at 1171 (Hon. Elinor Caplan); emphasis added.

26. At the committee stage in the House, government officials testified that the legislation did not alter the intent of the predecessor provisions, but rather that s. 117(4) of the *IRPA* maintained the "protection", and constituted a "safeguard", against prosecution of those rendering humanitarian assistance to refugee claimants.[28]

27. The government officials also testified that "these offences on smuggling and trafficking are key elements of our contribution to the international fight to try to put an end to the smuggling and trafficking of human beings."[29] This testimony suggests that the smuggling offence was preserved in the transition from the *Immigration Act* to the *IRPA* in anticipation of Canada's ratification of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (the "*Protocol*").[30] Canada had signed the *Protocol* on December 14, 2000, prior to the introduction of Bill C-11. Canada ratified the *Protocol* on May 13, 2002,[31] after the *IRPA* received Royal Assent. Canada's commitment to the *Protocol* forms part of the context of the enactment of s. 117(1) of the *IRPA*.

28. As discussed by the application judge, the *Protocol* prohibits smuggling of migrants for a financial or other material benefit.[32] Parliament is presumed to legislate in a manner that is consistent with Canada's international obligations, and the "values and principles" of international law.[33] The presumption is only rebutted by unambiguous evidence of specific legislative intent to depart from Canada's international legal obligations.[34] Rather than supplying unambiguous evidence of an intention to depart

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[28] House of Commons Standing Committee on Citizenship and Immigration, *Minutes of Proceedings*, 37th Parl., 1st Sess., No. 27 (May 17, 2001). AB, vol. 2 at 355 – 356.

[29] *Ibid.*

[30] 15 November 2000, 2241 U.N.T.S. 507 (entered into force 28 January 2004).

[31] For ratification information, see: http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html.

[32] Reasons for Judgment at paras. 65 – 66, AB, vol. 3 at 665.

[33] *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 at para. 34.

[34] *Ibid.* at para. 35; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53.

from the essence of the *Protocol*, the legislative history of s. 117(1) of the *IRPA* evinces an intention to criminalize precisely those acts prohibited by the treaty, and not more.[35]

29. The Crown's invocation in these proceedings of multiple and various purposes for s. 117(1) of the *IRPA* substantially inflates and distorts Parliament's objectives in 1988 and 2001 in enacting and maintaining the human smuggling offence. Indeed, the recitation of the purposes said by the appellant to underlie s. 117(1) of the *IRPA* recasts Parliament's objective, thereby offending the doctrine against shifting purpose.[36]

30. The BCCLA also says that the Court should be wary of claims to broad and amorphous, but emotionally charged, statements of purpose for criminal offences, such as protecting Canadian sovereignty and the safety and security of Canadians, or maintaining the integrity of Canada's immigration and refugee protection system. As Iacobucci and Arbour JJ. noted in rejecting "protection of 'national security'" as the purpose of s. 83.28 of the *Anti-Terrorism Act*, S.C. 2001, c. 41, broad characterizations of legislative intent have "the potential to go too far" and can have "implications that far outstrip legislative intent". The Justices cautioned that "courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered paradigm".[37]

31. In *R. v. Zundel*, in the context of the s. 1 analysis, McLachlin J. (as she then was) also warned:

> If the simple identification of the (content-free) goal of protecting the public from harm constitutes a "pressing and substantial" objective, virtually any law will meet the first part of the onus imposed upon the Crown under s. 1.[38]

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[35] Regarding the intent of the *Protocol*, see UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto* at 340, AB, vol. 3 at 572.

[36] *R. v. Big M Drug Mart Ltd., supra,* at 325; *R. v. Zundel*, [1992] 2 S.C.R. 731 at 761 – 762.

[37] *Application Under S. 83.28 of the Criminal Code, supra,* at para. 39.

[38] *R. v. Zundel, supra,* at 762.

32. Similarly, if generic social or political values are accepted as statements of legislative purpose in relation to a criminal offence, then virtually no criminal law will be overbroad because of the indeterminate nature of the claimed legislative objects. This result would be inconsistent with purpose of overbreadth analysis, *i.e.* to confine law-making to ensure that the liberty of the individual is not limited without reason.[39] It bears recall that the purpose of the *Charter* itself is the "unremitting protection of individual rights and liberties".[40] The breadth of s. 117(1) of the *IRPA* must be considered in light of this objective.

### C. Is s. 117(1) of the *IRPA* broader than necessary to achieve a legitimate state objective?

33. The BCCLA accepts that stopping human smuggling and protecting its victims in accordance with Canada's international obligations is a legitimate legislative objective. However, s.117(1) of the *IRPA* overreaches this objective.

34. The *Charter* requires that the means chosen by Parliament must be no broader than "necessary" to achieve its objective. Even allowing for a reasonable measure of deference for Parliament's policy choices in achieving its purpose, the necessity test indicates a requirement for close calibration or "sufficient precision"[41] between Parliament's objective and the law.

35. The application judge correctly found that the scope of s. 117(1) of the *IRPA* is too sweeping in comparison to its purpose. It captures people and activities that Parliament plainly did not intend criminalize, including humanitarians who bring individuals intending to claim refugee status into Canada without expectation of financial or other material benefit, family members of refugees who assist their kin to enter Canada to claim refugee status, and refugees rendering assistance to one another to get into Canada.

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[39] See *R. v. Heywood, supra*, at 793.

[40] *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

[41] *R. v. Heywood, supra,* at 792.

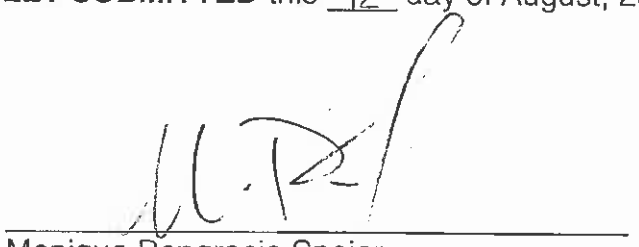
36. Notably, the appellant does not contest that the law is overbroad if the application judge correctly identified the law's objective; the appellant's argument is that Justice Silverman misapprehended the purpose of s. 117(1) of the *IRPA* and was thus led into error in the overbreadth analysis.[42] The appellant's argument must fail, given the legislative history described above.

37. Finally, the Crown has correctly conceded that s. 117(4) of the *IRPA* will not cure constitutional infirmity that inheres in s. 117(1). In light of this, the Court below was correct to declare s. 117(1) of the *IRPA* of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*.

## PART 4 – NATURE OF THE ORDER SOUGHT

38. The BCCLA agrees with the *Respon*dents that the appeal ought to be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12th day of August, 2013



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[42] See Appellant's factum at paras. 55 and 79.

## LIST OF AUTHORITIES

Constitutional and Statutory Provisions



Parliamentary Proceedings



International Instruments:

## Appendix A

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 117

Human Smuggling and Trafficking

Organizing entry into Canada

**117.** (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

Penalties — fewer than 10 persons

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(*a*) on conviction on indictment

(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(*b*) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.

Penalty — 10 persons or more

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

No proceedings without consent

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.