COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Appulonappa,*
2014 BCCA 163

Date: 20140430
Dockets: CA040592; CA040593;
CA040594; CA040595

Docket: CA040592

Between:

Regina

Appellant

And

Francis Anthonimuthu Appulonappa

Respondent

And

**British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
Canadian Council for Refugees**

Intervenors

- and -

Docket: CA040593

Between:

Regina

Appellant

And

Hamalraj Handasamy

Respondent

And

**British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
Canadian Council for Refugees**

Intervenors

- and -

Docket: CA040594

Between:

Regina

Appellant

And

Jeyachandran Kanagarajah

Respondent

And

**British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
Canadian Council for Refugees**

Intervenors

- and -

Docket: CA040595

Between:

Regina

Appellant

And

Vignarajah Thevarajah

Respondent

And

**British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
Canadian Council for Refugees**

Intervenors

Before: The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Hinkson

On appeal from: Orders of the Supreme Court of British Columbia, dated January 11 and 25, 2013 (*R. v. Appulonappa*, 2013 BCSC 31 and 2013 BCSC 198, Vancouver Registry No. 25796).

Counsel for the Appellant:	W.P. Riley B. Sokhansanj
Counsel for the Respondent, F. Appulonappa:	F. Begg
Counsel for the Respondent, H. Handasamy:	P. Edelmann
Counsel for the Respondent, J. Kanagarajah:	P. Rankin M. Rankin
Counsel for the Respondent, V. Thevarajah:	G. DelBigio, Q.C. M. Vis-Dunbar
Counsel for the Intervenor, British Columbia Civil Liberties Association:	M. Pongracic-Speier
Counsel for the Intervenor, Canadian Civil Liberties Association:	A. Nathanson G. Cameron
Counsel for the Intervenor, Canadian Council for Refugees:	L. Best
Place and Date of Hearing:	Vancouver, British Columbia October 7 and 8, 2013
Further Submissions Received:	January 16 and 22, 2014 April 3, 10, and 14, 2014
Place and Date of Judgment:	Vancouver, British Columbia April 30, 2014

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Hinkson

Summary:

The Crown charged the four respondents under s. 117 of the Immigration and Refugee Protection Act, S.C. 2002, c. 27, with the offence colloquially known as "human smuggling". The charges arose from the respondents' roles in the arrival of a freighter carrying 76 undocumented Sri Lankan Tamils to Canadian shores in 2009. The respondents brought an application for an order declaring that s. 117 infringed s. 7 of the Charter and was unconstitutionally overbroad. The trial judge allowed the respondents' application, declared the provision of no force or effect, and quashed the indictments charging the respondents. The Crown appeals from this decision.

Held: appeal allowed. The declaration of constitutional invalidity is set aside, the acquittals are overturned and a new trial is ordered.

Section 117's unambiguous terms, its legislative evolution, and Parliament's decision not to frame the section in the same language as the Migrant Smuggling Protocol demonstrate a broader objective than merely fulfilling Canada's international obligations to combat the "smuggling of migrants". The s. 117 offence is directed to Parliament's historical domestic concern with border control by preventing individuals from arranging the unlawful entry of undocumented migrants into Canada. The record does not support the respondents' contention that Parliament intended to exempt those acting through altruistic motives from prosecution under s. 117. Nor do the international instruments under consideration produce that result. The broad scope of the offence is thus aligned with its legislative objective, and the offence is not overbroad.

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] On October 17, 2009, Canadian authorities intercepted a freight ship, the MV Ocean Lady, off the west coast of Vancouver Island. On board were 76 Sri Lankan Tamil asylum-seekers, none of whom had proper documentation to enter Canada. Canadian authorities interviewed the migrants, who typically reported they had paid $5,000 on boarding the ship in Indonesia or Thailand, and were to pay a total of $30,000 to $40,000 for the voyage.

[2] The four respondents to this appeal, Francis Anthonimuthu Appulonappa (CA040592), Hamalraj Handasamy (CA040593), Jeyachandran Kanagarajah (CA040594) and Vignarajah Thevarajah (CA040595), are Sri Lankan nationals from the ship. The Crown appellant alleges they organized the voyage, and were the captain and chief crew members of the ship. It accordingly charged them by way of direct indictment with the offence of "human smuggling" under s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), which, as then in force, provided:

> 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.

[3] Prior to their trial, the respondents brought an application before the trial judge for a declaration that s. 117 is overbroad and thus infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. They argued the objective of the provision is to deter and penalize only those who engage in international human smuggling for material gain, but the offence is so broadly worded that it criminalizes the actions of individuals such as humanitarian workers or family members who, for altruistic reasons, assist refugee claimants in entering Canada illegally. The Crown responded that the scope of s. 117 was appropriate and consistent with Canada's objective to fulfill its international obligation to combat human smuggling. It maintained the breadth of the provision created desirable flexibility, and the requirement under s. 117(4) that the Attorney General consent to

proceedings under s. 117 ensured that family members and humanitarian workers would not be charged as human smugglers.

[4] Following a *voir dire*, the trial judge accepted the Crown's argument that the objective of s. 117 was to stop human smuggling and protect its victims in accordance with Canada's international obligations. He agreed with the respondents, however, that the offence cast too wide a net, and could not be saved by s. 1 of the *Charter*. He accordingly declared s. 117 to be of no force or effect: 2013 BCSC 31. In later reasons, the judge quashed the indictments against the appellants: 2013 BCSC 198.

[5] On appeal, the Crown seeks to set aside the declaration that s. 117 is unconstitutional. Its position is somewhat unusual as it has significantly recast its argument, and now maintains that the trial judge erred in accepting its submissions on the objective of s. 117 at the *voir dire*. In its reformulated argument, the Crown contends the judge should instead have found that the overarching aim of s. 117 is to prevent individuals from arranging the unlawful entry of others into Canada, thereby securing the secondary goals of enforcing Canadian sovereignty; maintaining the integrity of Canada's immigration and refugee regime; protecting the health, safety, and security of Canadians; and promoting international justice and security. The Crown says the trial judge was led into error because he misapprehended the effect of Canada's international obligations, and this in turn tainted his approach to the hypothetical scenarios presented by the respondents to demonstrate overbreadth.

[6] The respondents, supported by the intervenors, argue, first, that the Crown should not be permitted to advance a fundamentally different position on a central issue on appeal. In the alternative, they submit the trial judge made no error in finding s. 117 overbroad and of no force or effect.

[7] For the following reasons, I have permitted the Crown to advance its new argument and, having considered it, have determined that s. 117 is not unconstitutionally overbroad. I would accordingly allow the appeal.

The International and Domestic Legislative Framework

[8] It is useful to begin by setting out the relevant legislative framework, both domestic and international. Broadly speaking, it demonstrates an attempt to balance two principles. The first, derived from the sovereignty of nations, is that non-citizens have no right to enter or remain in a foreign state. Canada is thus entitled to limit access to its territory, and has no obligation to facilitate the arrival and entry of foreign asylum-seekers: *Deghani v. Canada (M.E.I.)*, [1993] 1 S.C.R. 1053 at 1070-71; *Medovarski v. Canada (M.C.I.)*, 2005 SCC 51 at para. 46.

[9] The second is that state parties have an international obligation to recognize the plight of refugees by offering refuge to foreign asylum-seekers who, in fleeing persecution, enter the territory of other nations illegally. Simon Brown L.J. described the basis for this in *R. v. Uxbridge Magistrates' Court and another, Ex p Adimi*, [1999] 4 All E.R. 520 at 523 (Q.B.D. D.C.):

> The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. As was stated in a 1950 Memorandum from the UN Secretary General:
>
> > 'A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.'

[10] The revolutions and world wars of the early 20th century produced millions of refugees. Attempts by the international community to provide meaningful protection to this population eventually culminated in the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6 (the "*Convention*"). Canada acceded to the *Convention* on June 4, 1969, and is therefore obliged to receive and protect refugees in accord with its provisions.

[11] Article 1 of the *Convention* defines "refugee". The relevant part reads:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> …

> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

[12] Despite Article 1(A)(2) of the *Convention*, the definition of "refugee" for Canada's purposes includes those whose plight results from events occurring after 1 January 1951, due to the operation of the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, Can. T.S. 1969 No. 29, to which Canada has also acceded.

[13] Article 31(1) of the *Convention* prohibits contracting states from penalizing refugees for illegally entering their territories:

> **REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE**
>
> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[14] Article 33 introduces the duty of *non-refoulement*, which prohibits a contracting state from expelling refugees or returning them to the place where their lives or freedom were under threat.

[15] Parliament first implemented Canada's obligations under the *Convention* in the *Immigration Act*, *1976-77*, R.S.C. 1985, c. I-2 (the "*Immigration Act, 1976*"), which entered into force on April 10, 1978. On June 28, 2002, it repealed that Act and replaced it with the *IRPA*, which, since then, has served as Canada's legislative response to the dual concerns of border security and refugee protection. All

references to the *IRPA* in these reasons, unless stated otherwise, relate to the legislation in force at the time of the alleged offences.

[16] Section 3(1) and (2) of the *IRPA* comprehensively lists its objectives, and s. 3(3) sets out interpretive guidelines for construing the legislation:

> 3. (1) The objectives of this Act with respect to immigration are
>
> (*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;
>
> (*b*) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;
>
> (*b.1*) to support and assist the development of minority official languages communities in Canada;
>
> (*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;
>
> (*d*) to see that families are reunited in Canada;
>
> (*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;
>
> (*f*) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;
>
> (*g*) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;
>
> (*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;
>
> (*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
>
> (*j*) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.
>
> (2) The objectives of this Act with respect to refugees are
>
> (*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
>
> (*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

> (*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
>
> (*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
>
> (*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
>
> (*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
>
> (*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
>
> (*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.
>
> (3) This Act is to be construed and applied in a manner that
>
> (*a*) furthers the domestic and international interests of Canada;
>
> (*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;
>
> (*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;
>
> (*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
>
> (*e*) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and
>
> (*f*) complies with international human rights instruments to which Canada is signatory.

[17] Part 1 of the *IRPA* deals with immigration, and sets out the requirements and procedures to enter Canada and remain as a permanent resident.

[18] Part 2 of the *IRPA* deals with refugee protection, and reflects Canada's obligations under the *Convention*. Section 96 adopts the *Convention* definition of refugee. Section 115(1) enacts the obligation of *non-refoulement* in accord with

Article 33. Section 133 reflects the protection afforded by Article 31(1) of the *Convention*, and precludes prosecution of refugee claimants for offences under the *IRPA* that arise from their illegal entry:

> 133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(*a*) or section 127 of this Act or under section 57, paragraph 340(*c*) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

[19] It is noteworthy for the purpose of this appeal that s. 133 does not exempt refugee claimants from prosecution under s. 117.

[20] There are over 10 million refugees in the world, and the world-wide demand for asylum far exceeds its availability. Countries with resettlement programs receive only about 100,000 refugees annually. The *IRPA* creates two methods by which refugees may seek asylum in Canada. *Convention* refugees may apply from outside Canada through a resettlement assistance programme, authorized by regulations under Part 1 of the *IRPA*, at the instance of the federal government or through private sponsorship. Canada resettles about 10,000 *Convention* refugees a year through this programme but it is fraught with delay. Alternatively, asylum-seekers entering Canada with or without entry documents may make a refugee claim on arrival, but they are not entitled to refugee protection under the *IRPA* until the Refugee Protection Division determines they are in fact refugees as defined by the *Convention*. Canada processes about 25,000 of these claims annually, and rejects more than half of them because the claimants are not *Convention* refugees but illegal migrants.

[21] Many countries have implemented strict border control measures to control illegal entry to their territory, which makes it more difficult for refugee claimants to seek asylum by simply arriving in a foreign state. As a result, those seeking refuge have increasingly sought assistance from others to reach foreign shores and seek asylum, and human smuggling has become more prevalent.

[22] On November 15, 2000, in response to international concern over the involvement of organized crime in migrant smuggling, human trafficking, and other transnational crimes, the United Nations, under the auspices of the United Nations Office on Drugs and Crime (the "UNODC"), adopted the *Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S. 275 (the "*UNCTOC*"), directed at promoting international cooperation to combat transnational organized crime. It also adopted a protocol directed expressly at human smuggling, the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,* 15 November 2000, 2241 U.N.T.S. 507 (the "*Protocol*"). Article 2 of the *Protocol* sets out its purpose, and Article 3 defines migrant smuggling. Article 4 defines the scope of the *Protocol*:

> *Article 2. Statement of purpose*
>
> The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.
>
> *Article 3. Use of terms*
>
> For the purposes of this Protocol:
>
> (*a*) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;
>
> …
>
> *Article 4. Scope of application*
>
> This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

[23] Article 6(1)(*a*) of the *Protocol* requires each signatory to enact domestic legislation criminalizing human smuggling and related activities, while Article 6(4) preserves the right of state parties to enact domestic offences. The relevant parts read:

Article 6. Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(*a*) The smuggling of migrants;

…

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

[24] Canada signed the *UNCTOC* and the *Protocol* on December 14, 2000, and ratified them on May 13, 2002.

[25] Section 117 of the *IRPA* came into force with the rest of that legislation on June 28, 2002. Throughout the events relevant to this appeal, it read in its entirety:

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.

(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.

(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.

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

[26] The *IRPA* also introduced s. 121, which establishes aggravating features for the purpose of determining a fit sentence for human smuggling. The relevant parts state:

> 121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether
>
> (*a*) bodily harm or death occurred during the commission of the offence;
>
> (*b*) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
>
> (*c*) the commission of the offence was for profit, whether or not any profit was realized; …

The Reasons for Judgment of the Trial Judge

[27] The trial judge accepted that Canada, as a signatory to international instruments dealing with refugees and human smuggling, has an international obligation to criminalize human smuggling, and emphasized ss. 3(2)(*a*) and (*b*) and ss. 3(3)(*d*) and (*f*) of the *IRPA* in that context. He observed, however, that the absence of a commonly-accepted definition of human smuggling presents difficulty for the signatories to these international instruments.

[28] The trial judge next reviewed Canada's approach to refugees. He acknowledged the plight of refugees and the response of the international community, and accepted that s. 133 of the *IRPA* represents Canada's attempt to implement its international obligations under Article 31 of the *Convention*:

> [59] Canada, and the international community generally, while not encouraging refugees to make their way to our shores, exempts them from criminal liability for whatever illegal actions they may have taken in order to successfully arrive here. Such illegal actions invariably include arriving here with forged, or completely without, documentation required for entry.
>
> …
>
> [63] Section 133 defers, or prohibits, prosecution for the act of arriving at a port of entry to Canada and making a legitimate refugee claim without a visa or documentation.
>
> [64] Both Article 31, and s. 133 of *IRPA* provide protection from prosecution for legitimate asylum claimants, but does [*sic*] not protect those who organize, induce, aid or abet, their arrival in Canada as s. 117 is not among the list of offences referred to in s. 133.

[29] The trial judge next examined Articles 2 and 3 of the *Protocol*, and noted the definition of "smuggling of migrants" is confined to offenders motivated by "a financial or other material benefit". He accepted that this is a negotiated minimum,

and that Article 6(4) of the *Protocol* and Article 34(3) of the *UNCTOC* permit individual countries to pass domestic laws that define human smuggling more broadly. He observed Australia, the United Kingdom and the United States of America, like Canada, have enacted broader legislation in which financial or material benefit is not an element of the offence of human smuggling.

[30] The judge found s. 117 was "Canada's response to its international obligations concerning human smuggling", and stated:

> [74] The parties agree that Canada's implied definition for human smuggling, as found in s. 117, must be interpreted in accordance with its international obligations. In that regard:
>
> 1. Sections 3(2)(a) and (b) of *IRPA* states [*sic*] clearly that one of its objectives is the protection of refugees in need of assistance.
> 2. Section 3(3)(f) of *IRPA* requires that it be construed and applied in a manner which complies with the international instruments to which Canada is a signatory. These instruments include the Migrant Smuggling Protocol.

[31] The trial judge then addressed whether s. 117, properly interpreted, excluded humanitarians and family members from prosecution, and concluded:

> [83] It is clear that the various parties to the relevant international instruments, including Canada, take the view that certain categories of persons, and conduct, are not intended to be prosecuted for human smuggling.
>
> [84] Those categories include:
>
> 1. those who provide support to migrants for humanitarian reasons; and
> 2. those who provide support to migrants on the basis of close family ties.

[32] The trial judge found support for this view in Article 31 of the *Convention* and in several documents related to the preparation and implementation of the *Protocol*, including the *travaux préparatoires*, which the trial judge quoted as follows:

> ... the intention was to exclude the activities of those who provided support to migrants for humanitarian reasons on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups, such as religious or non governmental organizations.

[33] He noted, however, that despite these statements of intent there was no international instrument or domestic legislation that expressly prohibited the prosecution of humanitarian workers or family members.

[34] After reviewing the principles that govern an assessment of unconstitutional overbreadth, as discussed in *R. v. Heywood*, [1994] 3 S.C.R. 761, the trial judge comprehensively set out the parties' arguments, including the hypothetical scenarios depicting assistance to refugee claimants from close family members or humanitarian workers that the respondents presented as demonstrative of overbreadth.

[35] Ultimately, the judge accepted the Crown's position that Canada's objective in enacting s. 117 was "to stop human smuggling and to protect victims of human smuggling in accordance with her international obligations". He found, however, that the provision was overbroad as it infringed the respondents' rights to life, liberty, and security of the person under s. 7 of the *Charter* by capturing a wider range of conduct and actors than was necessary to achieve this legislative objective. He stated:

> [141] Section 117 must be interpreted in light of Canada's international obligations, including the Refugee Convention, and Article 31. It must also be interpreted according to the objectives of *IRPA*, and in particular, sections 3(2)(a) and (b), concerning the objectives with respect to refugees.
>
> [142] The international instruments acknowledge that there is no intention to criminalize the activities of genuine humanitarian aid workers and/or family members who are assisting refugees, but s. 117 is so broad that its wording does in fact capture those persons committing criminal activity.
>
> [143] Section 117 does not expressly refer to human smuggling or to smuggling operations. This section is much broader than that, criminalizing any assistance given to persons coming to Canada who are not in possession of appropriate documentation.
>
> [144] If the arrival of a legitimate refugee at a port of entry without the required documentation does not attract criminal liability (s. 133 of *IRPA* and Article 31 of the Refugee Convention), why is it a crime to assist such a refugee to arrive?
>
> [145] It is clear that s. 117 makes no distinction for the persons involved or reasons behind the transport to and entrance into Canada, or whether or not the accused person has profited from the transportation of persons into Canada. This is different from the definition in the Migrant Smuggling Protocol

> which indicates that smuggling is an activity which occurs in order to obtain "a financial or other material benefit".
>
> [146] It is the clear, and appropriate intention for s. 117 to be more broad than the minimum standard required for international instruments so that it can appropriately stop and prosecute those human smugglers who exploit migrants for profit, or who seek to import terrorism to Canada. However, it was never intended that it be so broad as to stop and prosecute legitimate family members and humanitarian workers. As noted earlier, in the 2011 Issue Paper entitled "Smuggling Migrants by Sea", the UNODC notes that migrant smuggling is a criminal business which is competitively run as such.
>
> [147] As noted earlier, the position of the Crown is that the provisions of s. 117 comply with the "requirement of the Protocol" which notes that family members and humanitarian workers are not considered to be migrant smugglers.
>
> [148] The Crown's position that the proposed hypotheticals are not reasonable, simply because there is no possibility that anyone could ever be charged under the section, is not tenable. The determination of whether or not a hypothetical is reasonable must be based upon the activity complained of, not upon the possibility of whether or not persons would ever be charged. When simply the activities are concerned, the hypotheticals are eminently reasonable. The hypothetical with respect to family members occurs frequently. The hypothetical with respect to humanitarian aid workers happens often, and in fact resulted in a charge (although ultimately stayed) against Ms. Hinshaw-Thomas.
>
> [149] The two hypotheticals are technically within the scope of "human smuggling" under s. 117, but they are not within the objectives that Canada is trying to achieve through s. 117. To the contrary, it is the clear intention of the government not to prosecute such people.
>
> [150] The Crown points to no valid objective for the section to be so wide that it captures such persons referred to in the hypotheticals.
>
> [151] A proper consideration of those hypotheticals supports the defence argument that s. 117 is unnecessarily broad, and goes beyond what is necessary to accomplish the government's objective, and infringes s. 7 of the *Charter*.
>
> …
>
> [155] Therefore, the section casts too wide a net and is inconsistent with the principles and purposes of the international Conventions and Protocols.

[36] The trial judge concluded neither the requirement of the Attorney General's consent in s. 117(4) nor s. 1 of the *Charter* was sufficient to save the section.

[37] Turning to remedy, the trial judge found that attempting to interpret s. 117 in a manner that made it *Charter*-compliant, or trying to read in exceptions or read it down, would "smack of judicial intervention". He viewed consideration of the multiple

factors and priorities at play as a task that properly fell to Parliament rather than the courts. He accordingly concluded that the only appropriate remedy was to declare s. 117 of no force or effect.

Issues on Appeal

[38] I would reframe the issues raised by the parties to this appeal in this manner:

1. Is the Crown entitled to raise a new argument on appeal as to the legislative objective of s. 117?

2. In finding s. 117 was overbroad did the trial judge err by:

    a) misapprehending the legislative objective of s. 117;

    b) finding Canada's international obligations under the *Protocol* and the *Convention* inform the legislative objective of s. 117?

3. Is the declaration that s. 117 is overbroad and so of no force or effect sustainable?

Analysis

[39] I will deal with the first ground of appeal, and then address several issues of general import before considering the remaining grounds raised by the Crown.

1. Is the Crown entitled to raise a new argument on appeal as to the legislative objective of s. 117?

[40] As described briefly at the outset of these reasons, the Crown has significantly changed its position as to the legislative objective of s. 117. At the *voir dire*, it argued the provision was directed to stopping human smuggling and protecting its victims in compliance with Canada's international obligations. As well, the Crown took the position that s. 117 complied with the requirement of "international instruments" that humanitarians and family members not be charged with human smuggling because the Attorney General exercised his discretion under s. 117(4) to preclude such prosecutions.

[41] The Crown now urges this Court to find the trial judge erred in accepting its earlier position, and posits that the true intent of s. 117 is to prevent individuals from arranging the unlawful entry of others into Canada, thereby securing the secondary goals of enforcing Canadian sovereignty; maintaining the integrity of Canada's immigration and refugee regime; protecting the health, safety, and security of Canadians; and promoting international justice and security. It says that while combatting human smuggling remains one objective of s. 117, its primary purpose is broader and rooted in border control. As such, it applies universally without regard to the motive of those who provide assistance in entering Canada to undocumented refugee claimants. The Crown maintains that the prosecutorial discretion enacted by s. 117(4) provides a safeguard in the event that cases arise in which charges would not be in the public interest.

[42] The respondents, led by Mr. Thevarajah, argue that permitting the Crown to advance this fundamental change in its position on appeal would constitute double jeopardy. In support they cite *R. v. Varga* (1994), 18 O.R. (3d) 784 at 793c (C.A.):

> A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial. It offends double jeopardy principles, even as modified by the Crown's right of appeal, to subject an accused, who has been acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal. Double jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial.

[43] The respondents maintain the same principle applies here as the Crown is appealing an order quashing an indictment.

[44] With respect, I am unable to agree. *Varga* and other similar cases such as *Wexler v. The King*, [1939] S.C.R. 350, involve Crown appeals from an acquittal in which the Crown, in attempting to secure a conviction, sought to advance a position it had not put forward at trial. By contrast, this appeal arises from a constitutional challenge to legislation brought by the defence before trial. There has not been a determination of guilt or innocence. Nor has the Crown's fundamental response to the respondents' challenge changed. It continues to maintain that s. 117 is not overbroad, and that the respondents must proceed to trial.

[45] I find some analogy between these circumstances and those addressed in *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.), a case in which the accused faced charges under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*"), arising from his cultivation of marihuana for medical purposes. He brought a constitutional challenge to the provisions under which he was charged, arguing they contravened his rights under s. 7 of the *Charter* by forcing him to choose between his health and imprisonment. The trial judge found an infringement of his s. 7 rights, and read into the legislation an exemption for cultivation of marihuana for personal medically-approved use. During the hearing, no one raised s. 56 of the *CDSA*, which provided a ministerial exemption if necessary for a medical purpose. On appeal, the Crown sought to rely on s. 56 to save the legislation. The defence objected as it had not been raised before the trial judge. At paras. 169-171, Rosenberg J.A., writing for the Court, acknowledged that constitutional arguments raised for the first time on appeal should be reluctantly allowed as double jeopardy concerns may arise and the necessary adjudicative facts may not be available. He nevertheless decided the Court should consider the application of s. 56 since it was part of the statute under consideration, and failure to consider it when it was central to the government's defence of the legislation might undermine the legitimacy of the Court's judgment.

[46] Here, the constitutional validity of s. 117 is a question of law with broad ramifications beyond this case. This Court must strive to answer it correctly. I am persuaded that to preclude consideration of all available arguments on this issue could similarly undermine the legitimacy of our decision. The respondents' and intervenors' factums extensively address the Crown's new position, and do not suggest any prejudice in responding because this Court does not have before it the necessary adjudicative or legislative facts to fully consider their position.

[47] I am satisfied this Court may consider the Crown's new argument with respect to the legislative objective of s. 117.

2. General Matters Relevant to the Analysis

[48] Before turning to the remaining grounds of appeal, I will address three areas of general import: the principles governing an analysis of constitutional overbreadth; the applicable standard of review; and the principles and aids available to guide the issues of statutory interpretation and constitutional validity that arise on this appeal.

i) Unconstitutional Overbreadth

[49] The respondents' challenge to the constitutionality of s. 117 is grounded in s. 7 of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, which provide:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> …
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[50] The Supreme Court of Canada has discussed the principles governing an inquiry into unconstitutional overbreadth in *Heywood* at 790-94; *R. v. Khawaja,* 2012 SCC 69 at paras. 35-40; and, most recently, *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 93-123. I summarize these as follows.

[51] It is undisputed that the respondents' s. 7 rights to liberty and security of the person are engaged by the charges they face under s. 117. The pivotal issue is whether this intrusion accords with the principle of fundamental justice that legislation must not be overbroad. This principle stipulates that if an offence enacted to serve a legitimate state objective interferes with conduct that bears no connection to that objective, it is overbroad as it creates an infringement of s. 7 rights that is not connected to its purpose. It is accordingly unconstitutional unless it can be saved by s. 1 of the *Charter*. In *Bedford*, the Supreme Court described overbreadth in these terms:

> [112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there

> is no rational connection between the purposes of the law and *some*, but not all, of its impacts. …
>
> [113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.
>
> [Emphasis in original.]

[52] The onus rests on the respondents to establish that s. 117 is overbroad. The burden is not easily overcome. *Khawaja* suggests a three-step approach to the analysis: the first examines the scope of the law; the second ascertains its objective; the third determines whether the means selected by the legislators to achieve that objective are broader than necessary. If this analysis reveals the objective of the legislation is narrower than its scope, the law is overbroad.

[53] In the course of this analysis, the parties may present hypothetical scenarios to test the ambit of the offence. These must, however, be reasonable in the context of the crime in question, and deal with "imaginable circumstances which could commonly arise in day-to-day life" rather than far-fetched and extreme examples: *R. v. Goltz*, [1991] 3 S.C.R. 485 at 515-16; *R. v. Morrisey*, 2000 SCC 39 at para. 30; *R. v. Nur*, 2013 ONCA 677 at paras. 121-22, 133.

[54] Judges should approach an overbreadth analysis with a measure of deference, and recognize that legislators must have the power to make policy choices. Intervention is not permitted solely because the judge prefers a different means of accomplishing the state objective.

ii) The Standard of Review

[55] The issues of statutory interpretation and constitutional validity raised on this appeal are questions of law, reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[56] To the extent that the trial judge's analysis rested on his evaluation of social and legislative facts, however, this Court may not interfere unless these findings reveal a palpable and overriding error: *Bedford* at paras. 48-56.

iii) Principles of Statutory Interpretation and Interpretive Aids

[57] This appeal requires examination and interpretation of both domestic and international law. I find it useful to summarize the principles that guide this process at the outset of my analysis.

[58] The pre-eminent rule of statutory interpretation, repeatedly endorsed by the Supreme Court, is Driedger's "modern principle": *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 26. This provides:

> [T]he words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[59] The process of purposive analysis, discussed in Chapter 8 of Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), is another integral tool in ascertaining the legislative objective of a statutory provision. This exercise is directed to identifying the object of the legislation under review and, ultimately, to ensuring that proper attention is paid to an interpretation that best attains this object. Legislative purpose may be established by direct evidence, such as explicit descriptions of purpose in the legislation itself or in its legislative history, or in other authoritative sources. It may also be established indirectly, by reference to extrinsic materials that provide a factual basis from which an inference as to legislative purpose may be drawn. These materials may include parliamentary commissions or debates; statements by government departments that administer the legislation; domestic decisions with precedential value; authoritative academic articles; the legislative text and scheme; and examination of the mischief that the provision is designed to cure.

[60] The legislative scheme in this case includes the principles of construction set out in s. 3(3) of the *IRPA*, which are specific to that statute. Section 3(3)(*d*)

introduces consideration of the *Charter* in decisions taken under the *IRPA*, thus codifying the common law presumption that Parliament intends to enact legislation in conformity with the *Charter*: *R. v. Sharpe*, 2001 SCC 2 at para. 33. Sections 3(3)(*a*), (*c*) and (*f*) introduce the international context to the interpretive process, and support the presumption of conformity with international law. The Supreme Court summarized this principle of interpretation in *R. v. Hape*, 2007 SCC 26 at para. 53:

> [53] … It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 367-68.

[61] Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 (the "*VCLT*") govern interpretation of international treaties. Article 31 closely resembles the Driedger modern principle, and provides that the terms of a treaty will be interpreted in good faith in accord with their ordinary meaning, their context, and the object of the treaty. Article 32 permits recourse to supplementary means of interpretation in certain circumstances:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.

[62] Finally, with respect to expert evidence, the respondents called Professor Dauvergne, who testified to issues of refugee law and policy. Mr. Dandurand, who was called by the Crown, gave evidence as an expert in human smuggling as a transnational crime. I agree with the respondents that, to the extent that both experts strayed into providing opinions on the interpretation and application of international law and s. 117 of the *IRPA*, their testimony was not properly admissible as these were questions of law for the court. I accordingly limit my consideration of their evidence to factual matters.

3. Did the trial judge err by misapprehending the objective of s. 117?

[63] As set out in *Khawaja*, before ascertaining the objective of s. 117, it is advisable to first consider its scope. As McLachlin C.J. stated in *Sharpe* at paras. 32-33, "[u]ntil we know what the law catches, we cannot say whether it catches too much". This is a question of statutory interpretation, governed by the modern rule.

[64] Section 117 appears in Part 3 of the *IRPA*, which deals with enforcement, under a sub-heading titled "*Human Smuggling and Trafficking*". The provision does not contain or define the term "human smuggling". Instead, the plain words of s. 117(1) essentially define the offence by its four elements: the person being smuggled did not have the required documents to enter Canada; the person was coming into Canada; the accused organized, induced, aided or abetted the person to enter Canada; and the accused knew the person lacked the required documents for entry: *Canada (Public Safety and Emergency Preparedness) v. J.P.*, 2013 FCA 262 at paras. 85-86, leave to appeal to the SCC granted: 2014 CanLII 18477, 2014 CanLII 18478, 2014 CanLII 18479 (S.C.C.).

[65] Motive is not a constituent element of the offence. It is relevant only as an aggravating factor for the purpose of sentencing, pursuant to s. 121 of the *IRPA*. Section 117(4) provides that no proceedings will take place under s. 117 without the consent of the Attorney General, thereby providing a filter for reviewing potential charges before they are laid.

[66] I conclude the trial judge correctly found that s. 117 has a broad scope, and criminalizes the actions of anyone who provides assistance to persons entering Canada illegally without the required entry documents.

[67] Identifying the legislative objective of s. 117 is the second step in the overbreadth analysis, and the focus of this ground of appeal. The Crown argues the trial judge erred in finding that Canada enacted s. 117 solely in response to its international obligations under the *Protocol* to stop the smuggling of migrants and protect its victims. (I observe in passing it is hardly fair to describe this as an error, given the Crown's position below.) The Crown now maintains this is an overly narrow view of the objective of s. 117. While it agrees that combatting international migrant smuggling is one of its purposes, it says this goal is subsumed in the over-arching objective of preventing individuals from arranging the unlawful entry of others into Canada, derived from the sovereign right to control admission to national territory. It submits this in turn serves the several secondary domestic purposes I earlier described.

[68] The Crown says the trial judge was led astray in part because he did not fully consider the objectives in s. 3 of the *IRPA*, and failed to appreciate that s. 117 is not a refugee protection provision but an enforcement provision, directed to Parliament's concern with border control. It submits that by relying solely on the objectives and interpretive principles set out in ss. 3(2)(*a*) and (*b*) and 3(3)(*f*), which deal with refugee protection and Canada's international obligations, the trial judge failed to consider other objectives such as those in ss. 3(1)(*h*), and 3(2)(*e*), (*g*) and (*h*), which support Canada's right to limit and regulate the entry of migrants, and the Crown's "secondary purposes".

[69] The respondents reply, first, that the Crown has been inconsistent in reformulating the objective of s. 117, and relies on multiple changing and amorphous policies that improperly inflate and distort the sole clear parliamentary objective of s. 117 which is to criminalize human smuggling. They contend that if these indistinct concepts reflect the objectives of s. 117, the section adds nothing to the many other

provisions in the *IRPA* that regulate and penalize the admission of undocumented individuals. The respondents say the Crown's new objective is so broad and vague that it renders meaningful analysis of unconstitutional overbreadth impossible.

[70] Second, the respondents support the trial judge's formulation of the objective of s. 117. They maintain the temporal and linguistic relationship between s. 117 and the *Protocol*, as well as the parliamentary proceedings surrounding its enactment, clearly establish that s. 117 was enacted in response to Canada's international obligations to combat the smuggling of migrants under the *Protocol*, and thus was intended to criminalize only those who engage in migrant smuggling for profit or material gain. Alternatively, the respondents argue these factors, as well as the manner in which s. 117 has been enforced since its enactment, demonstrate Parliament clearly intended to exempt humanitarians and family members from prosecution under the provision.

[71] In support of their position, the respondents present hypothetical scenarios portraying assistance to refugees from humanitarian workers and family members, which they say would attract charges under s. 117 if the Crown's formulation of its objective is accepted. In particular, they describe a "core hypothetical", in which an Afghan woman fleeing persecution arrives in Canada unlawfully with her infant child. If she arrives alone and her refugee claim is genuine, s. 133 will grant her immunity from prosecution for illegal entry. If she brings her child, however, she is liable to prosecution under s. 117, as it is not an excluded offence under s. 133. Other hypotheticals depict asylum-seekers who are spouses or friends and assist each other in entering Canada illegally, or humanitarians or family members who help undocumented refugee claimants come to Canada by, for example, paying for their passage. The respondents maintain these are realistic, common scenarios, and say that Parliament cannot have intended that s. 117 would apply to such cases.

[72] As to the respondents' first point, I agree there has been some variation in the Crown's formulations of the objective of s. 117. On close analysis, however, I am satisfied any inconsistencies relate to what it describes as the "secondary

objectives" served by the provision. Its statement of the primary objective of s. 117—to prevent individuals from arranging the unlawful entry of others into Canada—has not varied. Nor does that formulation duplicate the aim of other provisions in the *IRPA* that address border control. I am satisfied the Crown's position provides a clear statement of purpose capable of constitutional analysis.

[73] It is instructive to begin the inquiry into the legislative objective of s. 117 by reviewing its evolution. Canada has had laws criminalizing those who assist undocumented migrants in entering the country since 1902. Early versions of the offence focussed on offenders involved in organizing illegal arrival by ship or railway, and showed little concern for the rights of the migrants, who were generally expelled: s. 2 of *An Act to amend the Immigration Act*, 2 E. VII, c. 14 (1902); ss. 65 and 66, the *Immigration Act*, R.S.C. 1906, c. 93.

[74] In 1919, Parliament enacted *An Act to amend the Immigration Act*, S.C. 1919, c. 25, which added this broader provision to the *Immigration Act*, S.C. 1910, c. 27:

> 33(8) Any transportation company or person including the master, agent, owner, charterer or consignee of any vessel, who shall bring into or land in Canada by vessel or otherwise, or shall attempt by himself or through another to bring into or land in Canada by vessel or otherwise, or shall conceal or harbour or attempt to conceal or harbour or assist or abet another to conceal or harbour in any place including any building, vessel, railway car, conveyance or vehicle, any prohibited immigrant, passenger or other person, shall be guilty of an offence against this Act, and shall be liable upon summary conviction thereof to a fine not exceeding five hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment, for each and every prohibited immigrant, passenger or other person so brought into or landed in Canada or attempted to be brought into or landed in Canada or concealed or harboured or attempted to be concealed or harboured.

[75] Section 33(8) remained in place through various amendments until 1953, when the *Immigration Act*, R.S.C. 1952, c. 325 came into force. Between 1953 and the enactment of the *IRPA*, s. 50(*j*) of the 1952 Act and, later, s. 94(1)(*m*) of the *Immigration Act, 1976*, criminalized individuals who knowingly induced, aided, or abetted any person to violate the relevant Act. Violations included coming into Canada by stealth or by using false or misleading travel documents (s. 50(*b*) of the

1952 Act), and appearing at a port of entry without obtaining a visa (s. 9 of the *Immigration Act, 1976*).

[76] In 1988, Parliament enacted *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, R.S.C. 1985 (4th Supp.), c. 29. The objects of the amendments were set out in s. 2.1:

> (*a*) to preserve for persons in genuine need of protection access to the procedures for determining refugee claims;
>
> (*b*) to control widespread abuse of the procedures for determining refugee claims, particularly in light of organized incidents involving large-scale introduction of persons into Canada to take advantage of those procedures;
>
> (*c*) to deter those who assist in the illegal entry of persons into Canada and thereby minimize the exploitation of and risks to persons seeking to come to Canada; and
>
> (*d*) to respond to security concerns, including the fulfilment of Canada's obligations in respect of internationally protected persons.

[77] The 1988 amendments introduced a new offence that criminalized third party assistance to undocumented migrants:

> 94.1 Every person who knowingly organizes, induces, aids or abets or attempts to organize, induce, aid or abet the coming into Canada of a person who is not in possession of a valid and subsisting visa, passport or travel document where one is required by this Act or the regulations is guilty of an offence and liable
>
> > (*a*) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years, or to both; or
> >
> > (*b*) on summary conviction, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both.

[78] Section 94.2 imposed increased penalties for offences involving ten or more undocumented migrants, setting a maximum fine of $500,000 and a maximum term of ten years' imprisonment. Section 94.3 provided that no proceedings could be instituted under ss. 94.1 or 94.2 without the consent of the Attorney General or his Deputy.

[79] The objectives in s. 2.1, as well as the escalation of penalties in ss. 94.1 and 94.2, suggest these amendments were generated primarily by concern about the threat presented to refugees, and to domestic concerns over security and border

control, by large-scale human smuggling or trafficking operations. The parliamentary proceedings surrounding these amendments confirm that recent arrivals of large numbers of undocumented migrants by sea, organized by "unscrupulous" smugglers for profit, provided an impetus for the amendments. They also demonstrate, however, that broader concerns were at play. Before the House of Commons legislative committee studying the 1988 amendments, on August 25, 1987, the Honourable Benoît Bouchard, Minister of Employment and Immigration, acknowledged that the arrival of increasing numbers of undocumented migrants in Canada, most of whom were ultimately found not to be genuine refugees, presented a potential threat to Canadian security and the integrity of Canada's immigration and refugee system, and also hampered protection for genuine refugees. Although considerable concern was expressed during the hearings over whether humanitarian groups such as churches could be charged under ss. 94.1 or 94.2, amendments to exempt these groups were defeated, and Parliament chose to enact the new offences in broad terms, similar to those of their predecessors, due to a concern that exemptions would undermine prosecutions. The Minister provided this summation:

> We are going to put a stop to the large-scale trafficking of illegal migrants by smugglers. There has been much discussion about amending these sections of the bill. We have all pressed lawyers and legislative drafters to consider alternatives to the current wording. We looked at phrases such as religious group, profit, reward, smuggle and clandestine entry, but every possibility creates loopholes and undermines our ability to prosecute the unscrupulous. We cannot let such individuals escape sanction by adding phrases which create insurmountable problems of proof and create gaps through which the unscrupulous would march.

[80] I draw from this legislative history that, for over a century before the enactment of s. 117, Canada addressed concerns about the illegal entry of migrants by, in part, enacting offences directed to those who assisted their entry. These domestic laws clearly preceded any international obligation to curb the smuggling of migrants related to Canada's membership in the international community. They were broadly drafted, with no exceptions based on the offender's motive or other characteristics. The only significant change in them over the years has been an escalation in penalties.

[81] In my view, the objective of these precursors to s. 117 can fairly be described as that advanced by the Crown: to prevent individuals from arranging the unlawful entry of others into Canada. The question is whether the trial judge correctly decided that, in enacting s. 117, Parliament departed from this broad purpose, and instead intended the provision to fulfill Canada's international obligation under the *Protocol* to stop the smuggling of migrants, as defined in Article 3 of that instrument.

[82] Section 117 was proclaimed into force as part of the *IRPA* in 2002. In the parliamentary proceedings leading to its enactment, concerns were again expressed about the broad scope of the offence, and whether those acting for altruistic motives would be subject to prosecution under s. 117. Members of the House of Commons Standing Committee on Citizenship and Immigration were advised that the requirement of the Attorney General's consent in s. 117(4), which mirrored that in s. 94.3 of the *Immigration Act, 1976*, would continue to provide protection in such cases, as the Attorney General would consider the motives of potential offenders in deciding whether to lay charges. This exchange during the Committee's meeting of May 17, 2001 between Mr. John McCallum, the Vice-Chair of the Committee, and Mr. Daniel Therrien, General Counsel, Legal Services, Citizenship and Immigration Canada, exemplifies the discourse:

> **Mr. John McCallum:** ... we heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?
>
> **Mr. Daniel Therrien:** The protection against such prosecutions is in subclause 117(4), which provides that no prosecution under the smuggling provision can occur without the consent of the Attorney General, who, obviously, in deciding whether to prosecute, will weigh the motives of the people who have assisted others to come illegally into Canada. This is, again, what the current act provides, and there are relatively few prosecutions on smuggling, certainly no complaints I've heard that under the current regime, which would be repeated in the new regime, people who acted on humanitarian grounds have been prosecuted for smuggling.

[83] Later in the same session, Ms. Joan Atkinson, Assistant Deputy Minister for Citizenship and Immigration Canada, when asked why these groups could not be

exempted from s. 117, referred again to the role of s. 117(4). She explained that the new provisions covering human smuggling and human trafficking were a key part of Canada's contribution to international efforts to put an end to these activities, and they must be strong offences. She went on:

> … Subclause 117(4) is what's in the current act. No proceedings under these offences can be undertaken without the consent of the Attorney General. That is the protection. It is in place with the offences we have relating to the smuggling of individuals in the current act, and as Daniel has said, there has been no prosecution of anyone who was involved in trying to help refugees come to Canada. That is the safeguard. All the circumstances will be reviewed by the Attorney General to put in humanitarian considerations without defining what that means. It means you don't have the flexibility you need for the Attorney General to be able to consider all the individual circumstances in a case before any decision is taken to prosecute.

[84] The respondents argue s. 117 is not just an iteration of the earlier offences that addressed third party assistance to illegal entrants, and instead represents Parliament's intention to comply with Canada's international obligations under the *Protocol*. They point out the enactment of the *IRPA* was proximate in time to Canada's ratification of the *UNCTOC* and the *Protocol*. As well, they say multiple features of the *IRPA* demonstrate that s. 117 was enacted in response to Canada's international obligation under these instruments to criminalize transnational migrant smuggling and trafficking. These include the introduction of the terms "human smuggling" and "human trafficking", and the creation of a separate offence for each, for the first time in Canada's immigration and refugee legislation. As well, the respondents point out other transnational crimes covered by the *UNCTOC* are referred to in parts of the *IRPA*. While they acknowledge that the *IRPA* does not adopt the definition of migrant smuggling in the *Protocol*, and thus does not limit the scope of s. 117 to those who provide assistance for "financial or other material benefit", they say that the aggravating circumstances listed in s. 121(1) are consistent with that definition, and with Articles 4 and 6 of the *Protocol*. Finally, they say the penalties created by s. 117 are some of the most severe under the *IRPA*, indicating its target must be offenders who are involved in international organized crime and the large-scale transportation of migrants for profit, as opposed to

individuals motivated by altruism or family relationships. They rely on the parliamentary proceedings I have outlined to support this view.

[85] I am not persuaded that these features are sufficient to sustain the trial judge's finding that the legislative objective of s. 117 was to stop the smuggling of migrants in accord with Canada's international obligations under the *Protocol*. Little can be inferred from the contemporaneity of s. 117 and the *Protocol*, given that the *IRPA* represented a complete overhaul of Canada's immigration and refugee legislation. While the parliamentary proceedings I have set out include passing reference to Canada's international obligation to combat human smuggling, and aspects of s. 117 and the *IRPA* undoubtedly reflect Parliament's intention to honour that obligation, other features of the legislation militate against a conclusion that this is the sole objective of s. 117.

[86] As earlier described, there has been a longstanding line of domestic offences criminalizing those who assist illegal migrants in breaching Canada's borders. Parliament enacted s. 117 in the same broad terms as its predecessors. The offence substantially mirrors its immediate predecessor, s. 94.1 of the *Immigration Act, 1976*, as amended, including the requirement of charge approval by the Attorney General in s. 94.3. The escalation in penalties over the years, and the fact sanctions increase with the number of migrants assisted, have been characteristic features in the evolution of the offence since early times, and are as consistent with national concerns over border control arising from human smuggling as they are with international concerns. It is particularly significant that Parliament declined to adopt the definition of smuggling of migrants in Article 3 of the *Protocol*, thereby choosing not to limit the domestic offence to perpetrators acting for financial or other material benefit.

[87] I am unable to agree with the trial judge that s. 117 was enacted solely to stop human smuggling in accordance with Canada's international obligation. While I accept the provision responds to this concern, I am satisfied its primary purpose, like

that of its predecessors, is to prevent individuals from arranging the unlawful entry of others to Canada.

[88] It remains to consider the respondents' argument that, independent of international concerns or obligations, it was Parliament's intent to exempt humanitarians and family members from prosecution under s. 117. They say the provision is therefore unconstitutionally overbroad because its scope is wider than its objective. Further, citing *Smith v. The Queen*, [1987] 1 S.C.R. 1045 at 1078-79, the respondents submit that Parliament's attempt to avoid this result by enacting s. 117(4) cannot succeed as prosecutorial discretion cannot save an unconstitutional law.

[89] The respondents maintain this view is supported by the parliamentary proceedings I earlier described, as well as the manner in which s. 117 has been enforced since its enactment. They point to a charge under s. 117 laid in 2007 against a Ms. Hinshaw-Thomas, an apparent humanitarian, which produced widespread public outcry and was ultimately stayed by the Public Prosecution Service of Canada ("PPSC"). As well, the respondents seek to introduce as fresh evidence a memorandum of the Canada Border Services Agency ("CBSA") relating to charges under s. 117. Finally, they rely on the Crown's position at the *voir dire* that the Attorney General does not and will not approve charges against humanitarians and family members under s. 117.

[90] In response, the Crown submits that Parliament's clear intent was to maintain a broad and strong offence to deter and penalize anyone who assists the unlawful entry of migrants. Section 117 is thus not overbroad as its scope and objective are identical. The Crown says the legislators nevertheless recognized that the multiple circumstances at play might produce difficult cases that could not be easily or comprehensively defined, in which prosecution would be unpalatable. They therefore chose to continue with the centralized prosecutorial policy, initially enacted in s. 94.3, as the administrative tool to address this and provide a filter for charges under s. 117.

[91] Dealing first with the import of the parliamentary proceedings, there is no question such exchanges, if relevant, may be admissible in constitutional cases. The authorities differ, however, as to whether they may be used as proof of legislative intent and, if so, how much weight should be given to them, due to concerns about reliability that arise from their political nature: *Heywood* at 787-89; *Németh* at paras. 46-47; *Application under s. 83.28 of the Criminal Code*, 2004 SCC 42 at para. 37. In that all parties seek to rely on aspects of these proceedings in this case and do not question their reliability, I propose to consider the proceedings but to exercise caution in determining how much weight they should have.

[92] Turning next to the case of Ms. Hinshaw-Thomas, the respondents rely on this to support their position that the Crown will not proceed with charges under s. 117 against humanitarians who assist asylum-seekers to enter Canada illegally. Ms. Hinshaw-Thomas was charged under s. 117 on September 26, 2007, and the PPSC stayed the charge on November 8, 2007. The evidence submitted by the respondents with respect to this case is a compilation of material forming part of a "Backgrounder", prepared by the Canadian Council for Refugees ("CCR") in January 2008, and drawing on Ms. Hinshaw-Thomas' case in aid of a "Proud to Aid and Abet Refugees" campaign directed to obtaining an amendment to s. 117 that would exempt those who assist the entry of refugee claimants for humanitarian motives. It includes what appears to be an op-ed piece, letters written by various groups advocating amendment to s. 117, and extracts from the parliamentary proceedings. Some of the letters appear to have been solicited by the CCR. One purports to be from six parliamentarians, but it is not on any letterhead, and has not been signed by any of these individuals, leaving its authorship unclear. Importantly, the material does not include an official record of the investigation and facts leading to the charge against Ms. Hinshaw-Thomas. The Backgrounder describes her as "the director of … a US church based refugee-serving organization" who, acting on humanitarian motives, assisted 12 asylum-seekers to present themselves at the Canadian border to make a refugee claim. An incomplete copy of a letter written December 13, 2007 from the PPSC to the Executive Director of the CCR advises that the Attorney General's authority to consent to charges under the *IRPA* has been delegated to that

office, sets out the federal charge approval criteria, and states that after assessing evidence submitted by the CBSA it was decided there was no longer a reasonable prospect of conviction and the charge was stayed. The portion of this letter in the Backgrounder does not specify what information in the evidentiary assessment led to the decision to stay the charge.

[93] I question the trial judge's decision to admit and rely on this evidence. While the charge against Ms. Hinshaw-Thomas and the stay of proceedings are not disputed, the information in the Backgrounder about these events is incomplete and has been collected to reflect a particular view of s. 117. The most significant information for present purposes—whether Ms. Hinshaw-Thomas was designated a "humanitarian" by the law enforcement agencies involved in the matter and, if so, what role this played in the decision to stay the charge—is absent. In my view, there are significant concerns about the reliability and admissibility of this information, and it has little utility in this analysis.

[94] The respondents next seek to rely on a memorandum dated October 15, 2007, prepared by the Director of the Investigations Division of the CBSA, which provides direction on "Charges under s. 117 *IRPA* for Human Smuggling". This document only came to their attention after the hearing of this appeal and, in subsequent submissions, they have applied to introduce it as fresh evidence relevant to Parliament's intent not to charge humanitarians under s. 117. The respondents say the memorandum is directed at proving legislative fact, and is admissible in the interests of justice on the issue of statutory interpretation, citing para. 22 of *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685, leave to appeal ref'd, 2010 CanLII 19305 (S.C.C.). The Crown opposes its introduction.

[95] I am satisfied the interests of justice favour admitting the memorandum in accord with the criteria in *Kennedy*. As a document emanating from one of the agencies charged with enforcing s. 117, it is cogent and creates no unfairness for

the Crown. As well, this Court is able to effectively assess its role in ascertaining the legislative objective of s. 117. I would accordingly grant the respondents' application.

[96] The stated intent of the memorandum is to provide background and guidelines to CBSA regional management and investigators when considering charges under s. 117. The Director states that his discussions with unnamed officials in Citizenship and Immigration Canada involved in drafting the *IRPA*, and his review of some of the evidence at the parliamentary proceedings in 2001, have helped to "distinguish the spirit from the letter of the law". He then states:

> … **The S.117 provision was intended for human smuggling activities and not intended to be directed against bona fide humanitarian actions.**
>
> Accordingly, an important consideration in these cases will be an assessment of the nature of the actions of the person organizing such entry, as situations involving the charging of fees for profit may fall outside the scope of true humanitarian actions.
>
> The issue of profit however is not an element of the offence, per se, but rather an aggravating factor as identified in s.121(1) of IRPA, to be considered by the Court in determining appropriate penalties. The AG approval requirement in 117 (4) was intended to help ensure that, in deciding whether or not prosecution was in the public interest, the AG could consider inter alia, the motives of the people who assist others to come illegally into Canada.
>
> … caution should be exercised when considering the application of s.117 in any non-clandestine or non-fraudulent situation. As with any potential prosecution, consideration should be given to the true intent and motivation behind the offence, gravity of the offence, and public interest when making the decision to recommend charges.
>
> [Emphasis in original.]

[97] The Director concludes by recommending consultation with the Investigations Division with respect to "sensitive cases, including those involving human smuggling elements that are not clandestine/fraudulent in nature."

[98] In my view, this memorandum provides equivocal support at best for the respondents' position. It sets out the opinion and understanding of one CBSA employee as to Parliament's intention, based on conversations with unknown civil servants six years after the fact. While the Director states that s. 117 is not directed at "bona fide" humanitarians, he gives no guidance as to how such individuals are to

be identified. Nor does he direct his staff not to recommend charges in such cases. Instead, he advises them that motive is a matter for the Attorney General to consider, and that they should exercise caution and consult in “sensitive cases”, that are not “clandestine” or “fraudulent”. I am not persuaded those terms connote any necessary association with altruistic motive.

[99] Finally, the respondents rely on the position taken by the Crown at the *voir dire* as demonstrative of Parliament’s intent not to prosecute humanitarians or family members under s. 117. The Crown below variously submitted that, since the enactment of s. 117, the Attorney General, in exercising the discretion under s. 117(4), would not, and even could not, provide consent to charges under s. 117 against humanitarians and family members because Canada’s obligations as a signatory to international instruments prohibited such prosecutions.

[100] The trial judge summarized the Crown’s position at para. 131 of his reasons:

> The Crown argues as follows:
>
> 1. Canada is a signatory to various international agreements.
> 2. *IRPA* s. 3 requires that Canada follow those agreements.
> 3. It follows that its allegiance to those agreements is binding on Canada as a matter of law.
> 4. Those international instruments state expressly that it is not the intention to charge humanitarian aid workers or family members with human smuggling.
> 5. Section 117(4) is the method by which Canada can fulfill that obligation. The Attorney General must apply s. 117(4) in compliance with international instruments and protocols.
> 6. It follows that the Attorney General has no discretion to charge persons involved in the legitimate work of humanitarian workers or family members. The Attorney General is bound as a matter of law to not approve such charges as surely as if that obligation were enshrined in Canadian legislation.
> 7. To be sure, the Attorney General will still have a discretion, but that discretion will relate to the question of whether or not the evidence satisfies him or her whether the person is indeed conducting the legitimate activities of a humanitarian worker or family member. If so satisfied, there is no discretion to consent to the charge.

> 8. The foregoing provides an explanation for why there may have been a charge laid in the Hinshaw-Thomas case (referred to earlier in this Judgment), which was ultimately stayed.

[101] I find the Crown's position at the *voir dire* perplexing, in that it contained a number of errors and inconsistencies on material issues. As explained later in these reasons, its interpretation of Canada's international obligations under the *Protocol* and the *Convention* was incorrect. This error was carried forward in its argument that the Attorney General's discretion under s. 117(4) was limited by "international instruments and protocols", which bound him "as a matter of law" not to approve charges against family members or humanitarian aid workers. In making this argument, the Crown was apparently unaware that the Attorney General had in fact consented to proceedings under s. 117 that resulted in a conviction of a family member, in *R. v. Bello*, [2004] O.J. No. 5312 (C.J.), and of a humanitarian, in *R. v. Callahan* (1 November 2012), Thunder Bay 113204 (Ont. C.J.).

[102] These cases were evidently not available to the trial judge. Nor were they provided to us at the hearing of this appeal. They came to light during the preparation of these reasons, and we have therefore sought and received further submissions from the parties as to their import, as they appear to belie both the Crown's position below, and the respondents' position on appeal.

[103] In *Bello*, a Nigerian citizen was charged under s. 117 when he brought his four-year-old daughter into Canada using false documents, with a plan to leave her in the care of a stranger without her mother's knowledge or consent. He pleaded guilty to the charge and was sentenced to time served of five-and-a-half months in custody, with two-for-one credit for that time. His refugee claim had not yet been adjudicated at the time of sentencing.

[104] In *Callahan*, an American "with a particular interest in assisting migrants who have been the subject of war torn countries" assisted two undocumented migrants, a Salvadoran man and a Honduran woman, to cross the Canadian border to make refugee claims. He was not paid to do so, and acted only for humanitarian purposes.

He was charged under s. 117 and pleaded guilty. He served 32 days of pre-trial custody, and his sentence was a $5,000 fine.

[105] I discern little support for the respondents in the Crown's ill-conceived position at the *voir dire*. Even if its portrayal of the matters fettering the Attorney General's discretion was correct, the record reveals nothing that necessarily links the parliamentary objective of s. 117 with the manner in which the Attorney General has subsequently chosen to exercise the prosecutorial discretion under s. 117(4). Secondly and more importantly, regardless of the Crown's position below, it is evident that the Attorney General has consented to the institution of proceedings against both a family member and a person acting for altruistic motives, neither of whom received a financial benefit for assisting the entry of illegal migrants.

[106] In conclusion, there is little to suggest that Parliament considered the circumstances of family members who provide assistance to each other in entering Canada unlawfully. The only reference to family in the parliamentary proceedings was a passing mention of a hypothetical sister. While I accept the respondents' hypothetical scenarios involving close family members portray circumstances in which prosecution would be unpalatable, the *Bello* case demonstrates a situation in which a charge against a parent who assisted the illegal entry of his daughter was warranted. The contrast between this case and the respondents' hypotheticals demonstrates the difficulty of defining exemptions for all cases. As well, other hypotheticals may be conjured to balance those of the respondents. For example, charges might be acceptable in a situation where a Canadian citizen assists the unlawful entry of relatives who are refugee claimants, but whose presence is inimical to Canadian safety and security due to illness or membership in a criminal organization, or an entity listed in s. 83.05 of the *Criminal Code*.

[107] The question of immunity for those who assist the illegal entry of migrants for humanitarian motives has received more attention from Parliament. It is evident that some members expressed concern that "people doing humanitarian work, reverends and saintly people" not be prosecuted under s. 117. The record as a whole,

however, demonstrates any attempt at drafting an exemption for such individuals foundered because of definitional difficulties and the overriding wish to retain a strong offence without “loopholes”.

[108] An examination of the terms “humanitarian” or “altruistic” demonstrates the legitimacy of these concerns. Such words are inherently subjective and imprecise, and rest on motive alone. Can one be a self-declared humanitarian? Will membership in any non-governmental organization, church, or a registered charity suffice? Is it enough that one does not profit from providing assistance? A question of purity of motive arises as well. I note those addressing this issue, including the parties and the trial judge, tend to preface the word “humanitarian” with descriptive terms such as “genuine”, “legitimate”, or “*bona fide*”, which suggests there exists a class of less reputable humanitarians who should not be exempt from charges. Hypotheticals can be portrayed from both sides that demonstrate the multiple factors at play. For example, should a humanitarian motive forestall charges in situations that compromise the integrity and efficiency of Canada’s refugee procedures? What of a person who, though well-intentioned, repeatedly, and after warnings, persists in assisting large numbers of refugee claimants to enter Canada illegally? What if those assisted, having jumped the queue, are routinely found to be illegal aliens rather than “genuine” refugees?

[109] It is evident that Parliament ultimately opted to enact a broad offence to firmly combat human smuggling. The legislators acknowledged, however, that the myriad factors at play in providing assistance to refugee claimants would produce some difficult and sensitive cases in which prosecution would be undesirable. They accordingly chose to enact s. 117(4) as the continuing policy instrument that would provide a filter in approving proceedings, and preclude any charges under s. 117 without a full assessment of all relevant circumstances, including motive, in the context of the two federal criteria for charge-approval: whether there is a reasonable prospect of conviction, and whether prosecution is in the public interest.

[110] Citing *Smith*, the respondents contend that this scheme cannot pass constitutional muster. They maintain it was incumbent on Parliament to carry out its clear will by comprehensively defining an exemption for humanitarians under s. 117, and the choice to effectively delegate this to the Attorney General represents an ineffective attempt to mask constitutional overbreadth with prosecutorial discretion.

[111] I am not persuaded this is so. I see little analogy between this case and *Smith*, in which a majority of the Supreme Court found the mandatory minimum sentence of seven years for importing a narcotic was cruel and unusual punishment and therefore unconstitutional under s. 12 of the *Charter*. Lamer J., at 1078H, rejected the Crown's argument that the law could be salvaged because the Crown exercised its discretion to charge minor infractions with lesser included offences, and held that any law that was inconsistent with the constitution was of no force or effect. *Smith* thus dealt with an attempt to save a provision whose effect, on the plain words of the enactment, was unconstitutional. By contrast, the respondents argue that Parliament's express intent to centralize charge approval with the Attorney General renders s. 117 unconstitutional. This policy tool is not an anomalous or unique phenomenon: see E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, loose-leaf 2d ed., vol. 1 (Aurora, ON: Canada Law Book, 2014), ch. 1 at 1-20 and *ff*. Moreover, *Callahan* precludes any argument that the Attorney General, as a matter of course, does not consent to charges against those who assist the illegal entry of refugee claimants through altruistic motives. I am unable to agree with the respondents that Parliament, in enacting s. 117(4), intended the Attorney General to enforce, through discretion, a strict prohibition against charging those who assist refugee claimants for altruistic motives.

[112] Finally, the respondents complain the shifting position of the Crown makes it impossible to discern who will be charged under s. 117. They say the discretion under s. 117(4) is being exercised arbitrarily on unknown criteria, and those who offer assistance to refugee claimants in illegally entering Canada are unable to assess the risk of attracting criminal sanctions under s. 117, or to challenge the

Crown's decision to prosecute. With respect, these complaints lie beyond the question of unconstitutional overbreadth raised on this appeal.

[113] The respondents have failed to establish that Parliament intended to exempt family members and humanitarians from charges under s. 117. The unambiguously broad terms of the provision admit of no exemptions. Nor does the policy tool of prosecutorial discretion introduce defined exemptions.

[114] I conclude that the primary legislative objective of s. 117 is rooted in the historical domestic concern of Parliament, as sovereign, with border control. The provision is directed at preventing any individual from arranging the unlawful entry of undocumented migrants into Canada. This in turn serves a number of secondary aims, including combatting international human smuggling, and addresses multiple domestic concerns, some of which are reflected in ss. 3(1)(*f*), (*h*) and (*i*) and (2)(*a*), (*b*), (*e*), (*g*), and (*h*) of the *IRPA*.

[115] In the domestic context, the objective of s. 117 is thus aligned with its scope, and the provision is not overbroad. It remains to examine whether Canada's international obligations under the *Protocol* and the *Convention* have any impact on this conclusion.

4. Did the trial judge err by finding Canada's international obligations under the Protocol and the Convention inform the legislative objective of s. 117?

[116] The trial judge, in a finding that was unquestionably influenced by the position taken by the Crown at the *voir dire*, decided that Canada's international obligations under "international instruments" informed the legislative objective of s. 117 because these instruments revealed there is no intention to prosecute humanitarians or family members for assisting refugees. He accordingly concluded that s. 117 was overbroad because its scope was broader than necessary to achieve his perceived objective of stopping human smuggling in accord with Canada's international obligations. He stated:

> [141] Section 117 must be interpreted in light of Canada's international obligations, including the Refugee Convention, and Article 31. It must also be interpreted according to the objectives of *IRPA*, and in particular, sections 3(2)(a) and (b), concerning the objectives with respect to refugees.
>
> [142] The international instruments acknowledge that there is no intention to criminalize the activities of genuine humanitarian aid workers and/or family members who are assisting refugees, but s. 117 is so broad that its wording does in fact capture those persons committing criminal activity.

[117] The respondents support the trial judge's conclusion. They say that the *Protocol* and *Convention*, properly interpreted in accord with the principles in Articles 31 and 32 of the *VCLT*, impose an obligation on Canada to refrain from enacting legislation that criminalizes the activities of those who assist the illegal entry of refugee claimants for humanitarian or family reasons. They maintain that when s. 117 is interpreted in accord with this obligation it is overbroad.

[118] The respondents face several difficulties in sustaining the trial judge's finding on this point. First, a law can only be overbroad if its scope is broader than its purpose. As previously described, the scope of s. 117 is indisputably broad. If the provision is interpreted in accord with the international obligation postulated by the respondents, the effect is to narrow its scope. To succeed in demonstrating overbreadth, the respondents must instead establish this international obligation narrows the legislative purpose of s. 117.

[119] Second, as described in *Hape*, while Parliament is presumed to legislate in conformity with international law, this presumption is rebuttable if unambiguous legislative language demonstrates an intent to ignore an international obligation. The unambiguously broad language of s. 117 strongly supports the view that, if an international obligation to exempt humanitarians and family members from prosecution for human smuggling does exist, Parliament, in enacting s. 117, exercised its sovereign right to ignore it. Thus, in the absence of other evidence that Parliament intended to fulfill such an obligation, it is difficult to discern how the *Protocol* or the *Convention* can be relevant to the legislative purpose of s. 117.

[120] Finally, even in the absence of these difficulties, for the following reasons I am of the view that neither the *Protocol* nor the *Convention* impose an obligation on state parties to exempt family members and humanitarians from prosecution for the smuggling of migrants.

i) Do Canada's international obligations under the Protocol inform the legislative objective of s. 117?

[121] The trial judge's findings with respect to Canada's international obligations under the *Protocol* appear somewhat inconsistent. At para. 87 of his reasons, he acknowledged that no international instrument or domestic legislation expressly prohibits the prosecution of humanitarian aid workers or close family members who assist the illegal entry of migrants. At para. 142, however, he reached a contrary conclusion, implying that the "international instruments" impose an obligation on Canada not to criminalize the activities of such individuals. It is apparent that he reached this determination by relying on the three documents related to the *Protocol* listed at para. 85 of his reasons: the *travaux préparatoires*; a 2011 UNODC training manual on prosecution of migrant smuggling under the *Protocol*; and a 2010 UNODC document titled "Issue Paper: a Short Introduction to Migrant Smuggling". Each of these contains statements that the *Protocol* is only directed to migrant smugglers motivated by material benefits, and is not intended to criminalize family members or those who assist for humanitarian reasons.

[122] In my view, the trial judge erred by giving decisive weight to these documents in interpreting Canada's obligations under the *Protocol*. While the *travaux préparatoires* may provide an interpretive aid in the event of ambiguity or a manifestly unreasonable result under Article 32 of the *VCLT*, these circumstances do not obtain here for reasons I will shortly explain. The other documents on which the trial judge relied were prepared after the *Protocol* was adopted as aids in its implementation. None of these was agreed to by state parties; nor do they have the status of "international instruments". They cannot impose an international obligation on Canada that does not arise from the terms of the *UNCTOC* or the *Protocol*, the instruments to which Canada is a signatory.

[123] Turning to those documents, the definition of migrant smuggling in Article 3 of the *Protocol* is confined to offenders who act for material or financial benefit. The trial judge accepted the evidence of Mr. Dandurand, who had been personally involved in the negotiations leading to the adoption of the *UNCTOC* and its protocols, that this is a negotiated minimum standard, required to preserve state sovereignty and facilitate international cooperation.

[124] The terms of the *Protocol* support this view. It does not require signatories to adopt the definition of migrant smuggling in Article 3. Instead, Article 6(4) states that the *Protocol* does not prevent a state party from taking measures against a person whose conduct constitutes an offence under its domestic law. Further, Article 11(6) of the *UNCTOC* provides that the description of the offences it establishes is reserved to the domestic law of the state party.

[125] As the trial judge observed, other signatories to the *Protocol*, including Australia, the United Kingdom, and the United States, have enacted domestic legislation to address human smuggling with a broader scope than the *Protocol*, in terms very similar to s. 117. While there is nothing to suggest the constitutionality of these parallel provisions has been challenged in these countries, they at least demonstrate consistency in the manner in which the international community has interpreted the *Protocol*.

[126] Two decisions of the Federal Court of Appeal, which were not available to the trial judge, lend support to the view that the *Protocol* does not limit the broad legislative purpose of s. 117: *J.P.*, *supra*; *B010 v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, leave to appeal ref'd, 2013 CanLII 63047 (S.C.C.). Both dealt with appeals from the judicial review of decisions of the Immigration and Refugee Board that addressed whether the appellants were inadmissible under s. 37(1)(*b*) of the *IRPA* on grounds of organized criminality for engaging in "people smuggling". The central issue was whether "people smuggling" was reasonably interpreted as requiring the element of financial or material benefit, as in Article 3 of

the *Protocol*, or whether it should be defined more broadly by reference to s. 117 of the *IRPA*.

[127] In *B010*, at paras. 76-80, Madam Justice Dawson, writing for the Court, found the Board had acted reasonably in defining "people smuggling" by reference to s. 117. She found nothing in the *UNCTOC* or the *Protocol* required signatories to enact legislation that tracked the language of those instruments, or prevented them from criminalizing a broader range of conduct. She concluded:

> [80] In summary, the [*UNCTOC*] and the Protocol required Canada, as a signatory, to criminalize the smuggling of migrants. Canada did so in section 117 of the Act. Nothing in the [*UNCTOC*] or the Protocol constrained Canada from criminalizing a wider sphere of smuggling activity than the conduct described in the Protocol. When construing the phrase "engaging in the context of transnational crime, in activities such as people smuggling" it is therefore appropriate to define "people smuggling" in terms of the crime created by section 117 of the Act.

[128] In *J.P.*, the Court followed *B010*, finding at para. 92 that motive, whether ideological, financial, or material, had no bearing on a determination of people smuggling under s. 37(1)(*b*).

[129] I am satisfied the *Protocol* does not impose an international obligation on state parties to exempt humanitarians or family members from domestic legislation enacted to combat human smuggling. It simply creates a minimum standard and does not preclude the enactment of broader domestic legislation directed to border control. It thus plays no role in discerning the legislative objective of s. 117 for the purpose of the overbreadth analysis.

ii) Do Canada's international obligations under the Convention confine the objective of s. 117?

[130] The trial judge's analysis of the *Convention* paralleled his approach to the *Protocol*. Although he found no express exclusion of humanitarians and close family members in the international instruments, he decided that an interpretation in accord with Article 31 of the *Convention* and ss. 3(2)(*a*) and (*b*) of the *IRPA* supported the conclusion that Canada had an international obligation to grant immunity to these

groups under s. 117. As well, he found the legislative scheme created by ss. 117 and 133 of the *IRPA*, which does not provide amnesty for genuine refugees, humanitarians, or family members who assist the unlawful entry of refugee claimants, was in breach of Canada's international obligation to grant immunity to refugees for illegal entry under Article 31(1) of the *Convention*. (For ease of reference, these provisions are set out at paras. 13, 16, 18, and 25 of these reasons.)

[131] The Crown acknowledges Canada's international obligations under the *Convention*, and maintains the *IRPA* recognizes and fully complies with these. It points to the paramountcy of refugee protection and assistance in ss. 3(2)(*a*) and (*b*), and s. 115(1), which enacts the duty of *non-refoulement*, as well as the extensive legislative provisions directed to procedural fairness and provision of necessaries to migrants while their refugee claims are being determined, as required by the *Convention*. The Crown says, however, that the *Convention* has no bearing on the legislative intent of s. 117, as it does not impose an international obligation to exempt humanitarians and family members from domestic legislation directed to human smuggling. The Crown maintains the trial judge erred in finding otherwise.

[132] The respondents concede the *Convention* does not expressly address state parties' obligations toward third parties who assist asylum-seekers in finding refuge. They argue, however, that the Crown's position disregards Canada's clear international obligation to enact a refugee regime that is consistent with the spirit of the *Convention*. The respondents maintain that because Article 31(1) mandates suspending the prosecution of legitimate refugees for entering Canada illegally, there is an implicit international obligation on state parties to also suspend prosecution against refugees, family members, and humanitarians who help refugees to enter illegally. They say the framework created by ss. 117 and 133 of the *IRPA* dishonours that obligation in two ways. First, the exclusion of s. 117 from the amnesty provided by s. 133 unjustifiably increases the risks and dangers faced by refugees by exposing them to prosecution for offering assistance to each other in arriving in Canada. A conviction under s. 117 may lead not only to imprisonment, but

may also compromise the offender's admissibility to Canada, even if he or she is a genuine refugee. Second, s. 117 improperly creates unacceptable risk to the liberty interests of those who assist refugees for humanitarian or family motives.

[133] As well, the respondents argue that Article 31(1) of the *Convention*, at the least, implicitly exempts at least close family members from prosecution when they assist each other in illegally entering Canada, pointing once more to the "core hypothetical" of the Afghan mother and infant. In support, they rely on the fact Article 31(1) uses the plural "refugees", and the endorsement of the principle of family unity in the preamble to the *Convention* and in s. 3(1)(*d*) of the *IRPA*. They say family members commonly seek refuge together, and it is unrealistic to say they must arrive one by one or be subject to prosecution under s. 117.

[134] Some of these arguments are misdirected in that they address whether s. 117 (as well as s. 133) must be interpreted in compliance with international law. As indicated at the outset of this section, this is a question of statutory interpretation that addresses the scope of s. 117. The only question relevant to overbreadth is whether the *Convention* creates some international obligation that impacts the legislative objective of the provision.

[135] The dangers and dire circumstances faced by refugees as they flee persecution are undisputed. It is also common ground, however, that the international obligations of state parties to refugees under the *Convention* do not extend to granting a right of entry to asylum-seekers. These obligations arise only when refugee claimants arrive in the territory of a signatory.

[136] I agree with the respondents that these obligations must be interpreted in accord with Articles 31 and 32 of the *VCLT*, and the principle of "good faith" under Article 31 requires a broad interpretive approach. This principle is not, however, in itself a source of obligation and does not justify a departure from the text of the treaty. The court's task is limited to interpreting that to which the parties have agreed: *R. v. Immigration Officer at Prague Airport et. al., ex parte European Roma Rights Centre et. al.*, [2004] UKHL 55 at paras. 18-19.

[137] I discern no ambiguity in Article 31(1) of the *Convention*. It clearly provides immunity from prosecution for refugee claimants with respect to offences related only to their own illegal entry. There is nothing in its words or context that can be interpreted as extending this immunity to refugee claimants who provide assistance to each other in entering the territory of a state party illegally. I appreciate this regrettably increases the risks faced by legitimate refugees who seek asylum here. From the point of view of state signatories, however, this is balanced by legitimate domestic concerns of border control and the fact that, in Canada, over half of the refugee claimants who enter illegally turn out to be illegal aliens rather than genuine refugees.

[138] For similar reasons, I am unable to agree that the *Convention* may be interpreted as imposing an implicit international obligation to exempt family members from prosecution under s. 117. While the preamble encourages state parties to extend rights granted to a refugee to members of his or her family, and to take necessary steps to ensure the unity of the family is maintained and minors are protected, I cannot interpret this as limiting Parliament's intent to enact broad domestic legislation directed to border control and illegal entry. I concur with the *obiter* comments of the Federal Court of Appeal in *B010* and *J.P.*, *supra*, that one is entitled to expect that "common sense will prevail" in situations in which family members assist each other in their flight to Canada and that prosecution of family members under s. 117 should be unlikely. The prosecution of Mr. Bello, described previously, exemplifies a situation, however, in which an exemption would not be desirable or accord with family unity.

[139] I reach the same conclusion with respect to any implied international obligation to exempt those who provide humanitarian assistance. I note James C. Hathaway in his text, *The Rights of Refugees under International Law* (Cambridge, UK: Cambridge University Press, 2005) at 402-405, considered whether Article 31(1) could be invoked by a humanitarian organization that assists refugees to enter an asylum country without documentation and decided it could not. He also describes the negotiations surrounding this issue among the state parties in which, although

there was general agreement such organizations should not be penalized for offering assistance, they defeated a Swiss proposal to amend Article 31(1) to that effect due to concern this would encourage humanitarian organizations to promote illegal entry rather than simply respond to requests for help. Professor Hathaway advocates caution in imposing immigration-related penalties on "innocent agents of entry", however, and is complimentary of Canada's law and this country's reluctance to impose penalties against those who assist refugee claimants in other than "egregious" cases.

[140] In short, the unambiguous terms of Article 31(1) provide no basis on which to conclude the *Convention* imposes an implied international obligation on Canada to exempt humanitarians or family members from domestic legislation criminalizing human smuggling. I conclude the trial judge erred in his finding to the contrary.

5. Is the declaration that s. 117 is overbroad and so of no force or effect sustainable?

[141] The onus rests on the respondents to establish s. 117 is unconstitutionally overbroad. The central question is whether the provision is inherently bad because there is "no connection, in whole or in part, between its effects and its purpose". The lack of connection is evident when a law brings conduct into its scope that bears no relation to its purpose. This is not an easy standard to meet: *Bedford* at paras. 117, 119. Deference must be given to Parliament's policy choices.

[142] The plain words of s. 117 create an offence that is unambiguously broad in scope. The central issue in the trial court and on appeal has been whether Parliament intended to exempt humanitarians and family members from prosecution under the provision. If so, the objective of s. 117 would be narrower than its scope, and the offence would catch conduct that is unrelated to its purpose, rendering it unconstitutionally overbroad.

[143] I have concluded I am unable to accept the respondents' and intervenors' submissions that Parliament intended to exempt humanitarians or family members from s. 117. For the reasons I have expressed I am satisfied that, in enacting this

provision, Parliament intended to create a broad offence with no exceptions, directed to concerns of border control and the particular issue of deterring and penalizing those who assist others in entering Canada illegally. While it recognized there may be difficult and sensitive cases in which prosecution under s. 117 would be unpalatable, it found these defied comprehensive definition and elected to enact centralized charge approval by the Attorney General as a means to ensure all circumstances, including motive, would be assessed before charges were laid under s. 117.

[144] The respondents have failed to demonstrate that the enforcement of the offence since its enactment reveals any implicit exemption for humanitarians or family members. Nor have they established that Canada's international obligations under the *Protocol* and *Convention* inform the legislative objective of s. 117, requiring Parliament to exempt these groups from prosecution for human smuggling.

[145] I conclude the legislative objective of s. 117 is aligned with its scope. Both are broadly based, and the conduct caught by the provision is rationally connected to its purpose. Section 117 is therefore not unconstitutionally overbroad.

[146] I would allow the appeal, and set aside the trial judge's order declaring s. 117 of the *IRPA* (as enacted and enforced at the time of the charges against the appellants) to be inconsistent with s. 7 of the *Charter* and of no force or effect. I would as well set aside the acquittals of the appellants, and direct a new trial.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Hinkson"