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R. v. Boule

2020 BCSC 1846

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2020 BCSC 1846 R. v.Boule

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v.Boule,

2020 BCSC 1846

Date: 20201127

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Registry: New Westminster

Regina

v.

Robert Boule

Before: The Honourable Madam Justice Iyer

Reasons for Judgment - Charter Voir Dire

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Place and Date of Hearing:

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I. OVERVIEW

- [1] Robert Boule owns the Smuggler's Inn, a property located on the American side of the American-Canadian border. The Smuggler's Inn abuts 0 Ave. in Surrey, British Columbia, and the border is indicated by marked rocks spanning the Inn's backyard.
- [2] The Crown alleges that Mr. Boule assisted foreign nationals to cross from the United States into Canada through the Smuggler's Inn. Mr. Boule is charged with a number of offenses under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 ("Act") that prohibit such conduct. He is also charged under the Criminal Code, R.S.C. 1985, c. C-46 ("Code") with breaching a term of his release that prohibited him from engaging in the alleged activity.
- [3] In this application, Mr. Boule challenges the constitutional validity of three sections of the Act. He says that they infringe his right to liberty under s. 7 of the Charter in a manner not in accordance with the principles of fundamental justice because they are overbroad, arbitrary and vague, and they cannot be justified under s. 1 of the Charter.
- [4] Below, I set out the undisputed facts and the sections of the Act that Mr. Boule challenges. Following that, I will refer to the applicable legal principles in order to frame the issues more precisely. I will then address each issue to the extent necessary.

II. UNDISPUTED FACTS

- [5] Mr. Boule is an American citizen. He has owned and operated the Smuggler's Inn for many years. As mentioned, the Smuggler's Inn straddles the American-Canadian border, so it is possible to walk from the U.S. into Canada through the Inn's backyard.

- [6] In April 2018, Mr. Boule was charged with contravening s. 117 of the Act on nine occasions for his alleged involvement in helping foreign nationals enter Canada illegally between April 2016 and September 2017. A few weeks later, he was arrested on a warrant when he entered Canada.
- [7] At Mr. Boule's bail hearing, the provincial court judge released him on a cash recognizance and conditions that included requiring him to keep the peace and be of good behaviour and prohibiting him from assisting "any person in the United States with attempting to enter Canada by any means in contravention of any Canadian law."
- [8] In June 2019, the Crown stayed the April 2018 charges.
- [9] In October 2019, the Crown charged Mr. Boule on a 21-count indictment relating to incidents alleged to have occurred between May 2018 and March 2019. Twelve of those counts relate to Mr. Boule's alleged breaches of his release conditions contrary to s. 145(3) of the Code. As Mr. Boule does not challenge the constitutionality of s. 145 of the Code, I do not consider those charges in this application.
- [10] Seven of the counts allege that Mr. Boule contravened s. 131 of the Act at a specified time and location by assisting a named individual to contravene s. 124(1)(a) of the Act. The two remaining counts allege that Mr. Boule contravened s. 117 of the Act at a specified time and location by assisting a named individual to come into Canada knowing that or being reckless as to whether their coming into Canada would contravene the Act. These two sets of charges are the subject of Mr. Boule's Charter challenge.
- [11] At the outset of this voir dire, I qualified Deanna Okun-Nachoff as an expert in immigration law practice, to opine on the operation of immigration policy and practice relating to inadmissibility and ineligibility of temporary and permanent residents, students, visitors and refugee claimants, including the policies and practices available to cure or rectify a loss of legal status. I held that her expert report was admissible.
- [12] Ms. Okun-Nachoff's evidence provides helpful background information about the operation of various aspects of the Act. Having reviewed the written and oral submissions of the parties, I find it unnecessary to rely on it beyond that.

III. CHALLENGED SECTIONS OF THE ACT

- [13] The Act creates a complex regulatory regime governing immigration and refugee protection. Its introductory sections set out the Act's objectives and contain interpretive guidelines. Part 1 deals with immigration to Canada. Part 2 deals with refugee protection. Part 3 contains the Act's enforcement provisions. Part 4 establishes the Immigration and Refugee Board, and Part 5 contains transitional provisions and consequential amendments. Section 2(2) of the Act specifies that it includes regulations made under it and Minister's instructions made under s. 14.1(1). Section 92(1) of the Act provides that a regulation may simply incorporate by reference certain types of material, and s. 9 provides for the creation of provincial

immigration programs whose requirements also form part of the Act.

[14] Part 3 contains the impugned provisions. Along with other related offences, s. 117 is found under the heading, "Human Smuggling and Trafficking" and provides:

Organizing entry into Canada

117 (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

Penalties -- fewer than 10 persons

- (2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable
 - (a) on conviction on indictment
 - (i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or
 - (ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and
 - (b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

Penalty -- 10 persons or more

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

Minimum penalty -- fewer than 50 persons

(3.1) A person who is convicted on indictment of an offence under subsection (2) or (3) with respect to fewer than 50 persons is also liable to a minimum punishment of imprisonment for a term of

- (a) three years, if either
 - (i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or
 - (ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or
- (b) five years, if both

- (i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and
- (ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

Minimum penalty -- 50 persons or more

(3.2) A person who is convicted of an offence under subsection (3) with respect to a group of 50 persons or more is also liable to a minimum punishment of imprisonment for a term of

(a) five years, if either

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(b) 10 years, if both

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

No proceedings without consent

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

[15] Section 131 is found under the heading "General Offences" and provides:

Counselling offence

131 Every person who knowingly induces, aids or abets or attempts to induce, aid or abet any person to contravene section 117, 118, 119, 122, 124 or 129, or who counsels a person to do so, commits an offence and is liable to the same penalty as that person.

[16] Section 124(1)(a) is identified in the indictment as the contravention Mr. Boule is alleged to have assisted a named person to commit. Section 124 is also a "general offence" and provides:

Contravention of Act

124 (1) Every person commits an offence who

(a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;

- (b) escapes or attempts to escape from lawful custody or detention under this Act; or
- (c) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.

Deemed knowledge

- (2) For the purposes of paragraph (1)(c), a person who fails to exercise due diligence to determine whether employment is authorized under this Act is deemed to know that it is not authorized.

Due diligence defence

- (3) A person referred to in subsection 148(1) shall not be found guilty of an offence under paragraph (1)(a) if it is established that they exercised all due diligence to prevent the commission of the offence.

IV. ISSUES

[17] Where the constitutionality of legislative provisions are challenged, the court must first determine their meaning; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 188; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. This is an exercise in statutory interpretation. It requires the court to read the text of the provision contextually, in light of the legislative scheme, the statute's general purpose and relevant legal norms: *Ruth Sullivan, Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014). This assists the court to identify the purpose and scope of the impugned provisions.

[18] Next, the court must assess the validity of the challenged provisions under the sections of the Charter identified by the Applicant. Here, the Applicant claims that the impugned laws violate s. 7 of the Charter:

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.

[19] All agree that Mr. Boule's liberty interest is engaged because he may go to jail if he is convicted. Therefore, the focus of the s. 7 analysis in this case is on whether the impugned provisions are consistent with the principles of fundamental justice. Mr. Boule argues that the impugned provisions are overbroad, arbitrary, and/or vague, all defects well recognized as rendering a law fundamentally unjust.[1]

[20] Briefly, a law is unconstitutionally overbroad if it "goes too far and interferes with some conduct that bears no connection to its objective." (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 101 [Bedford].) A law is unconstitutionally arbitrary if there is no connection between the object of the law and its effect: *Bedford* at para. 98. A law is unconstitutionally vague if it does not sufficiently delineate an area of risk that gives

citizens fair notice of the proscribed conduct and does not limit enforcement discretion: R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 639 [Nova Scotia Pharmaceutical].

- [21] If any of the impugned provisions infringes s. 7, the court must determine whether the infringement is justified as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society under s. 1 of the Charter. The s. 1 analysis changes the focus from the impact of the law on individuals and groups to include consideration of its impact on society: R. v. Oakes, [1986] 1 S.C.R. 103 at 139.
- [22] Finally, if the law is not saved under s. 1, the court must fashion an appropriate remedy.
- [23] It is convenient first to address the Charter challenge to s. 117 of the Act and then to turn to ss. 124(1)(a) and 131.

V. IS SECTION 117 UNCONSTITUTIONAL?

A. What Does s. 117 Mean?

1. The text

- [24] The plain meaning of the text of s. 117(1) is that it prohibits anyone from organizing, inducing, aiding or abetting others to come into Canada where the person either knows or is reckless as to whether the entry would contravene the Act. Subsections (2) to (3.2) establish a hierarchy of penalties depending on the number of people involved and the presence of aggravating factors.
- [25] Where the contravention involves fewer than 10 people, s. 117(2) makes the offence punishable by summary conviction or by indictment to legislated maximum terms of imprisonment and/or fines. If 10 or more are involved, s. 117(3) requires proceeding by indictment with higher maximum penalties. By virtue of ss. 117(3.1) and (3.2), the presence of specific aggravating factors triggers mandatory minimum terms of imprisonment ranging from three or five years in contraventions involving fewer than 50 people (s. 117(3.1) and mandatory minimums of five or 10 years if 50 or more are involved (s. 117 (3.2)). The aggravating factors are:
- where the person committing the offence endangers the life or safety of, or causes bodily harm or death to any of the people crossing the border, and/or
 - where the commission of the offence was for profit or a criminal organization or terrorist group was involved.
- [26] Subsection 117(4) requires the consent of the Attorney General of Canada before proceeding with charges under this section.

2. Purpose of s. 117

[27] The two primary interpretive resources for determining the purpose of s. 117 in this case are first, the Supreme Court of Canada's interpretation of the immediate predecessor of s. 117 in *R. v. Appulonappa*, 2015 SCC 59 [Appulonappa] and second, the 2012 legislative amendments that created the present s. 117. As the 2012 amendments were enacted before Appulonappa was decided, Parliament did not have the benefit of the Supreme Court's reasons when considering the 2012 amendments. In Appulonappa, the Supreme Court noted but did not consider the 2012 amendments.

[28] Characterization of the purpose of the law is a critical step in an overbreadth challenge because the more narrowly a purpose is defined, the more likely the scope or effect of the law is to be broader than its purpose and to capture conduct outside its purpose: *R. v. Moriarity*, 2015 SCC 55 at paras. 28-29.

a) The Appulonappa Decision

[29] Appulonappa challenged the constitutionality of the former s. 117 under s. 7 of the Charter on the basis that it was overbroad.

[30] At that time, s. 117 read:

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

Penalties -- fewer than 10 persons

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

(a) on conviction on indictment

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

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

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

Penalty -- 10 persons or more

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

No proceedings without consent

- (4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.
- [31] The Court rejected the Crown's characterization of the section's purpose as to "catch all acts that in any way assist the entry of undocumented migrants": Appulonappa at para. 32. It interpreted the former s. 117's purpose more narrowly as aimed at combatting people smuggling in the context of organized crime. The Court found that the section prohibited conduct unrelated to its purpose. It described that conduct as humanitarian aid, mutual aid and family member aid. As the section's scope overshot its purpose, the Court found that the former s. 117 was unconstitutionally overbroad.
- [32] The Court's determination of the purpose of the former s. 117 is important in this case because the Applicant says that the 2012 amendments did not alter that purpose. The Crown disagrees. It claims that the 2012 amendments significantly broadened s. 117's purpose.
- [33] In Appulonappa, the Court acknowledged that the text of the former s. 117 suggested that its purpose was broad: to combat human smuggling. However, it explained the text is only one factor to consider in defining the legislative purpose of a statutory provision: Appulonappa at para. 34. The Court examined relevant international instruments, the role of s. 117 in relation to the Act as a whole, the Act's stated objectives, the legislative history of s. 117 and parliamentary debates. Drawing on these five interpretive resources, the Court defined the former s. 117's purpose more narrowly than its words alone suggest.
- [34] Following the approach set out in Appulonappa, my determination of whether and to what extent the 2012 amendments change the purpose of s. 117 draw on the same five contextual resources. I will review the Supreme Court's contextual interpretation of the previous s. 117 in Appulonappa and then examine the 2012 amendments.
- [35] First, the Court examined relevant international instruments, particularly the Convention relating to the Status of Refugees, 189 U.N.T.S. 150 and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 U.N.T.S. 480. It concluded at para. 45 that "Canada's international commitments support the view that the purpose of s. 117 is to permit the robust fight against people smuggling in the context of organized crime."
- [36] Second, with respect to the role of the former s. 117 within the scheme of the Act, the Court noted that section 37(1)(b) is the only section outside of Part 3 of the Act that mentions people smuggling. Section 37(1)(b) makes inadmissible to Canada persons who have engaged in people smuggling or trafficking in the context of transnational crime. The Court read these provisions as indicating the following purpose:

- [48] Reading the inadmissibility and enforcement provisions of the IRPA harmoniously and as part of an integrated scheme therefore supports the view that the purpose of s. 117 is to penalize organizing or abetting illegal entry to Canada through acts knowingly connected to and furthering transnational organized crimes or criminal aims, to obtain, directly or indirectly, a financial or other material benefit.
- [37] Third, the Court reviewed the express statements of objectives in s. 3 of the Act, summarizing them as generally directed at humanitarian and security goals. It concluded:
- [57] In sum, while the security goals of the IRPA and the amendment that became s. 117 are important, they do not supplant Canada's commitment to humanitarian aid and family unity. Both broad aims must be respected. This is accomplished by interpreting s. 117 as targeting organized smuggling operations having a criminal dimension, thereby excluding humanitarian, mutual and family aid.
- [38] Fourth, the legislative history of the former s. 117 informed the Court's interpretation of its purpose as follows:
- [63] From this brief survey of the historical evolution of prohibitions on assisting the entry to Canada of undocumented people, I draw the following conclusions: (a) the prohibitions have, for over a century, focused on smuggling activity tied to organizing and furthering the illegal entry, not aid merely incidental to it; (b) successive revisions to the provision have coupled increased penalties with more precise targeting of organized crime-related smuggling activity, and the 2001 revision in particular followed in the footsteps of key developments in international law; and (c) s. 117, from its inception in 1988 and as continued and revised by the IRPA in 2001, provided a filter to screen out assistance not associated with organized criminal smuggling, namely innocent humanitarian acts, mutual aid and assistance to family members.
- [39] Fifth, the Court's review of the parliamentary debates also supported identifying the former s. 117's purpose as excluding humanitarian, family and mutual aid from the scope of the prohibition. During the debates, government representatives stated that the requirement in s. 117(4) that the Attorney General authorize all s. 117 prosecutions was intended to ensure that individuals who engaged in these aid activities would not face criminal sanction.
- [40] Reading the text in its full interpretive context, the Court concluded that its purpose was narrower than its scope (Appulonappa at para. 70):

the purpose of s. 117 is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada.

- [41] The Court rejected the Crown's argument that the former s. 117's overbreadth could be cured by the prosecutorial discretion in s. 117(4):

- [72] The scope of s. 117(1) is plain. The provision admits of no ambiguity. Parliament itself understood when it enacted s. 117 that the provision's reach exceeded its purpose by catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada, but argued that this overbreadth was not a problem because the Attorney General would not permit the prosecution of such people. We cannot avoid the overbreadth problem by interpreting s. 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of s. 117(1), which unambiguously make it an offence to "organize, induce, aid or abet" the undocumented entry. To adopt this suggestion would violate the rule of statutory interpretation that the meaning of the words of the provision should be read in their "grammatical and ordinary sense": Sullivan, at p. 28. It would also require us to ignore statements from the legislative debate record suggesting Parliament knew in advance that the provision was overbroad.
- [74] In my view, s. 117(4) does not cure the overbreadth problem created by s. 117(1). Ministerial discretion, whether conscientiously exercised or not, does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment. So long as the provision is on the books, and so long as it is not impossible that the Attorney General could consent to prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment. If the Attorney General were to authorize prosecution of such an individual, despite s. 117's limited purpose, nothing remains in the provision to prevent conviction and imprisonment. This possibility alone engages s. 7 of the Charter. Further, as this Court unanimously noted in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 17, per Moldaver J., "prosecutorial discretion provides no answer to the breach of a constitutional duty". See also Nur.
- b) The 2012 Amendments
- [42] The 2012 amendments make three changes to the text of s. 117.
- [43] First, the offence is no longer confined to situations where the person seeking to enter Canada lacks necessary documents. It now includes anyone seeking to enter in contravention of the Act.
- [44] Second, the mental element has been broadened. The Crown no longer has to prove that the accused knew that the person(s) seeking to enter Canada were undocumented. Proof of being reckless as to whether the person(s) seeking to enter Canada would be in contravention of the Act is sufficient.

[45] Third, the scale of penalties has been expanded. Not only does s. 117 distinguish between contraventions involving less than 10 people and those involving 10 or more, but also between those involving less than 50 people and those involving 50 or more where the following aggravating factors are present:

- where the person committing the offence endangers the life or safety of, or causes bodily harm or death to any of the people crossing the border, and/or
- where the commission of the offence was for profit or a criminal organization or terrorist group was involved.

[46] Before 2012, s. 117 did not contain any aggravating factors. Instead, s. 121 set out aggravating factors to be considered in imposing penalties under ss. 117, 118 (human trafficking) and 119 (disembarking persons at sea). These four factors were:

- (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; and
- (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

[47] These aggravating factors now only apply to penalties for the offences in ss. 118 and 119.[2]

3. Analysis of Purpose of s. 117

[48] Reading the words of s. 117 as compared to its predecessor suggests that its purpose is broader. Inclusion of the aggravating factors implies that human smuggling involving bodily harm or threats to safety, for profit, or in connection with a criminal organization or terrorist group is a subset of the conduct Parliament intended to penalize. If the purpose were to be gleaned from the words alone, it would be to prohibit all human smuggling, including but not limited to human smuggling with one or more of the aggravating factors.

[49] However, as in *Appulonappa*, textual meaning is only one factor in interpreting the purpose of a provision. I must also consider the five interpretive resources discussed in *Appulonappa*. As neither party suggested that Canada's international obligations, the role of s. 117 within the scheme of the Act, or the Act's statement of its objectives have changed, I rely on what *Appulonappa* says about them. For the same reasons, I need not review the legislative history or parliamentary debates before 2012, but can simply rely on *Appulonappa*. As in *Appulonappa*, these contexts point to a narrower interpretation of s. 117 than is evident from the text alone.

- [50] The question is whether the 2012 amendments and the parliamentary debates associated with them point to a broader legislative purpose than the purpose of its predecessor as construed in Appulonappa.
- [51] Parliament intended to expand the scope of the former s. 117 in order to relieve the Crown from having to prove that an accused subjectively knew that the person(s) seeking to enter Canada did not have the necessary documents. This full mens rea requirement of proof of knowledge of lack of the proper documents was described as a "loophole" in Appulonappa and it made successful prosecutions extremely difficult. During the Parliamentary debates, government representatives expressly said that the inclusion of recklessness in the mental element of the offence was simply to close that loophole. In light of this, I find that this amendment does not otherwise broaden the purpose of s.117.
- [52] In my view, the change in the definition of the prohibited conduct from assisting persons to come into Canada "who are not in possession of a visa, passport or other document required by the Act" to assisting persons to come into Canada "in contravention of the Act" does not change the provision's purpose. It is not discussed in the Parliamentary debates and neither party relies on this change. The substance of the prohibited conduct remains illegal entry into Canada.
- [53] I reach a different conclusion about the addition of the aggravating factors to s. 117. These factors are not confined to human smuggling related to "organized crime", which was the purpose identified in Appulonappa. They include human smuggling related to terrorist groups, all human smuggling for profit, and human smuggling that endangers or harms would-be entrants in the ways specified, whether or not for profit. The purpose of the present s. 117 is broader than that of its predecessor, encompassing all human smuggling that is for profit, is related to criminal or terrorist organizations, and/or endangers asylum seekers.
- [54] The five contextual interpretive resources support this characterization of its purpose. All of the conduct at which the present s. 117 is aimed falls within the egregious activities identified in the relevant international instruments, the role of s. 117 in the scheme of the Act, the Act's objects, the legislative history of s. 117 and associated parliamentary debates.
- [55] I conclude that the purpose of s. 117 is to prohibit all (1) human smuggling that is for profit, (2) human smuggling related to criminal or terrorist organizations, and (3) human smuggling that endangers asylum-seekers.

B. Does Section 117 Accord with the Principles of Fundamental Justice?

- [56] The Applicant argues that s. 117 is unconstitutional because it is overbroad and it is vague.

1. Overbreadth

- [57] The Supreme Court of Canada's conclusion in Appulonappa that the former s. 117 was overbroad does not automatically apply to the amended provision, which was not before it. That said, the overbreadth analysis in Appulonappa is obviously relevant and helpful in assessing overbreadth here.
- [58] A law is overbroad if it captures conduct unrelated to its purpose. The analysis has three steps: (1) interpret the scope of the provision, (2) determine its true purpose, and (3) compare the purpose of the law with its scope: *R. v. Khawaja*, 2012 SCC 69 at para. 40.
- [59] It is clear from my characterization of the purpose of s. 117 that the provision's scope overshoots its purpose in the same way as its predecessor did, by prohibiting what the Supreme Court of Canada described in Appulonappa as humanitarian aid, mutual aid and family aid. I will refer to these collectively as "Aid Activities".
- [60] The Applicant submits that s.117 is not only overbroad because it prohibits Aid Activities, but also because it prohibits other activities that fall outside s. 117's purpose. This calls for an examination of what constitutes Aid Activities.
- [61] In the companion cases of *R. v. Christurajah*, 2019 BCCA 210 and *R. v. Rajaratnam*, 2019 BCCA 209, which arose under the former s. 117, the Court of Appeal decided that Aid Activities are "true defences" to a charge under s. 117 of the Act, rather than elements the Crown must prove. The Court of Appeal also summarized what constitutes these Aid Activities (para. 136 of *Christurajah* and para. 275 of *Rajaratnam*):
- The constitutional remedy in Appulonappa created true defences to a charge of human smuggling under s. 117 of the IRPA.
 - The remedy created three defences: humanitarian aid, mutual aid, and family member aid.
 - The defences do not have sole purpose requirements.
 - The humanitarian aid defence has four elements: (i) the accused must act for the purpose of providing humanitarian aid, and not for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime; (ii) the accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, which is a person from another state who intends to seek refuge in Canada from persecution or physical harm; (iii) the aid must be humanitarian, a question to be determined by the trier of fact in accordance with the principles of impartiality, neutrality, and independence; and (iv) the accused must reasonably believe that the person assisted is an asylum seeker.
 - The mutual aid defence has four elements: (i) the accused must act for the purpose of providing aid to a fellow asylum seeker, and not for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime; (ii) the accused must be an asylum seeker, as defined above; (iii) the accused must reasonably believe that the person assisted is an asylum seeker; (iv) the accused and the person they are assisting must have the common purpose of seeking refuge. There is no requirement of mutuality of

effort.

· Family member aid is not a subset of mutual aid. An accused who is not an asylum seeker can raise the family member aid defence.

[62] Rajaratnam illuminates the breadth of the Aid Activities. For example, the sole purpose of the accused need not be to provide aid because "it is unrealistic to expect to have someone to have a sole motivation in respect of an action as complex and demanding as transporting asylum seekers to the Canadian border": Rajaratnam at para. 218. Evidence of a financial motive does not necessarily disqualify an accused from invoking the humanitarian aid defence; it is simply a factor to be considered: Rajaratnam at para. 221. Even an accused who has a different criminal motive may invoke the defence:

[222] Finally, in respect of the "other criminal motive" issue, we do not think most other criminal purposes should bar an accused from accessing the defence in respect of a charge under s. 117. The Crown gives the example of someone who transports both illicit drugs and asylum seekers at the same time. Although the accused's other criminal purpose could help establish that their purpose was not humanitarian, we do not see why they could not have access to the humanitarian aid defence for their charges under s. 117, yet be separately convicted of drug offences. The criminal motive depriving an accused of the defence is confined to human smuggling.

[63] In order to be humanitarian, the aid must be impartial, independent and neutral. However, the Court of Appeal cautioned that these principles should not be applied strictly because doing so "would criminalize a broad swath of laudable conduct with no connection to transnational organized crime": Rajaratnam at para. 245. The Court of Appeal recognized that those engaged in humanitarian aid may be complicit in corruption because of the extremely difficult circumstances in which such aid occurs. Determination of whether aid is humanitarian is a question of fact to be informed by all of the circumstances: Rajaratnam at para. 246.

[64] In light of the broad scope of Aid Activities, it is hard to conceive of what human smuggling activity would fall outside of s. 117's purpose but fall within the definition of Aid Activities. The Applicant's reasonable hypotheticals do not identify such conduct.

[65] The Applicant suggests that "all family members, friends, bus drivers or taxi drivers who aid a person who is inadmissible for any reason, to reach a port of entry" are subject to prosecution under s. 117. I disagree. Section 117(1) clearly links "contravention" with "coming into Canada". It is not a contravention of the Act for a person who is inadmissible to Canada to arrive at a port of entry and request entry. The Act empowers immigration officials to authorize entry in various situations. A contravention of the Act occurs only when the inadmissible person actually enters Canada.

[66] The Applicant's other hypotheticals of a professional advising a client to "flagpole"[3] and of a professional advising a person to make an inland refugee claim are also flawed. It is not a contravention of the Act to request regularization of lapsed status at a port of entry or to make a refugee claim, and a person who "organizes, induces, aids or abets" another to do so is not subject to prosecution under s. 117. A contravention within the meaning of s.117 occurs only if the regularization request or refugee claim is denied and the person enters Canada despite this. To be subject to s. 117, the person providing aid would have to know such a fact or be reckless as to its truth.

[67] In summary, the Applicant's hypotheticals do not identify conduct falling outside the Aid Activities that is unrelated to the purpose of s. 117. I conclude that s. 117 suffers from the same overbreadth problem as its predecessor. It is unconstitutional to the extent that it criminally penalizes persons who provide humanitarian, mutual and family assistance aid to asylum-seekers.

2. Vagueness

[68] The rule against vagueness ensures the intelligibility of criminal laws. It does not require that a person know in advance with certainty whether they will be convicted, only that the essential elements of an offence are sufficiently precise to allow individuals to identify an area of risky conduct, and that they set meaningful limits on enforcement discretion: *R. v. Levkovic*, 2013 SCC 25 at para 33-35. In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 16, the Supreme Court of Canada described the prohibition against vagueness:

A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at p. 109.

[69] When considering whether statutory terms are vague within the meaning of s. 7 of the Charter, courts must first exercise their interpretive function. They must attempt to give meaning to the provision based on prior judicial interpretation, the legislative purpose, the subject matter and nature of the impugned provision, societal values and related legislative provisions. Only if these sources do not yield an intelligible interpretation is the provision unconstitutionally vague: *Levkovic* at paras. 47-48.

[70] The Applicant argues that ss. 117, 124(1)(a) and 131 are all vague because they use the term "contravention." He says that term is vague because it is not defined in the Act, and the definition of "contravene" in the Interpretation Act, R.S.C. 1985, c. I-21 as a "failure to comply with" is unhelpful. He says that "contravention" does not provide an intelligible standard sufficient to identify an area of risk because the vast and complex immigration regime makes it impossible to know all of the myriad ways a contravention can arise. I will address that argument in relation to ss. 124(1)(a) and 131 below. In my view, it cannot succeed in relation to s. 117(1).

[71] It is helpful to look at the text of s. 117(1) again:

Organizing entry into Canada

117 (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

(Emphasis added.)

[72] The section limits "contravention" to illegal entry into Canada. By doing so, it defines an intelligible area of risk. It puts citizens on notice that helping a person enter Canada in circumstances where they know the person cannot do so legally or they are reckless about that fact puts them at risk of prosecution under s. 117.

[73] When used in s. 117(1), the meaning of "contravention" is limited by its context, much in the same way that the very broad term "public interest" was found to be limited by the securities context in *Johnson v. British Columbia (Securities Commission)*, 2001 BCCA 597.

[74] In *Johnson*, the appellant relied on the conclusion of the Supreme Court of Canada in *R. v. Morales*, [1992] 3 S.C.R. 711 that the term "public interest" as used in the former s. 515(10)(b) of the Code respecting when bail should be granted was unconstitutionally vague. The Court of Appeal rejected that argument:

[34] On the strength of *Morales* the appellant constructs an argument that the Act exposes him to an administrative penalty of up to \$100,000, loss of the opportunity to make a living in the securities industry, interference with his ability to manage his assets, and possible prosecution for regulatory offences - all without any defined boundaries of the public interest he is said to have violated.

[35] I do not see a parallel between *Morales* and this case. The phrase "public interest" invites the question "in relation to what?" It is much harder to answer that question in the context of the bail provisions of the Code than it is when considered in connection with the Securities Act. The objects and purposes of the latter are much narrower and more clearly definable and they serve to circumscribe the legal debate surrounding public interest. The Act is aimed at regulating the capital markets and protecting the general public. While arguably some aspects of ss. 161 and 163 may have a punitive effect when viewed from the appellant's

perspective, the Act is regulatory rather than criminal legislation.

[75] The Court of Appeal referred to other decisions interpreting the purposes of the Securities Act, R.S.B.C. 1996, c. 418 and concluded that those purposes provided sufficient guidance for legal debate as to the scope of prohibited conduct. Accordingly, it found that the impugned provision was not vague.

[76] Here, the text of the section identifies contraventions related to the coming into Canada as the prohibited conduct. This is sufficient guidance for legal debate about what constitutes a contravention of s. 117. As used in s. 117, the term "contravention" is not unconstitutionally vague.

3. Justifying Section 117 under Section 1

[77] In Appulonappa, the Court assessed the justifiability of the former s. 117 under the s. 1 framework. It rejected the Crown's argument:

[82] The Crown's position appears to be that even though the provision is overbroad, it is nevertheless minimally impairing, because although imperfect, there was no better alternative. As discussed, the government recognized in advance that the provision would catch conduct it did not intend to criminalize. However, Parliament nevertheless enacted an overbroad provision because it was concerned that wording exempting this conduct would create unacceptable loopholes. Section 1 of the Charter does not allow rights to be limited on the basis of bare claims, but requires the Crown to provide a demonstrable justification for inconsistencies with Charter rights: Oakes, at pp. 136-37. The Crown has not satisfied its burden under s.1

[78] The Crown advances the same argument here and it is as unpersuasive. Enactment of the present s. 117 gave Parliament the opportunity to reconsider the scope of the provision in relation to the Aid Activities. The fact that it did not make any changes strongly suggests that it continued to consider it appropriate to address that concern through the prosecutorial discretion in s. 117(4).

[79] The Crown argues, relying on Bedford at para. 113, that enforcement practicalities may justify a s. 7 infringement. However, it led no evidence about what those enforcement practicalities are. It simply asserted that excluding the Aid Activities would compromise the integrity of the immigration scheme. This falls far short of the evidence necessary to justify a constitutionally flawed law under s. 1.

[80] I conclude that s. 117 infringes s. 7 because it is overbroad and that infringement is not justified under s. 1 of the Charter.

VI. ARE SECTIONS 124(1)(a) AND 131 UNCONSTITUTIONAL?

A. Is the Constitutional Validity of Section 131 in Issue?

- [81] Before turning to these provisions, I will address the Crown's submission that s. 131 is not properly the subject of the Applicant's Charter challenge.
- [82] The Applicant is charged under s. 131 with counselling an offence under s. 124(1)(a). His Notice of Constitutional Question identifies s. 131, along with ss. 124(1)(a) and 117 as infringing s. 7 of the Charter because they are vague, arbitrary and overbroad and not saved by s. 1.
- [83] The Crown points to the fact that the relief the Applicant seeks with respect to s. 131 is only that it be read down as not applying to ss. 117 and 124(1)(a). It says that this means that the Applicant's real attack is on ss. 117 and 124(1)(a) and that s. 131 is only challenged insofar as it relates to those allegedly unconstitutional sections. The Applicant referred to s. 131 in some of the hypotheticals posed in relation to overbreadth arguments concerning s. 124 (1) (a), but did not address it independently.
- [84] I find that the constitutional challenge to s. 131 in this case is limited to its incorporation of ss. 117 and 124(1)(a), and does not include criminalization of conduct related to the other offences it lists. Having addressed s. 117 above, it follows that s. 131 is unconstitutionally overbroad insofar as it prohibits a person "who knowingly induces, aids or abets, or attempts to induce, aid or abet any person or who counsels any person" to engage in conduct that falls outside the permitted constitutional ambit of s. 117. Similarly, the constitutionality of s. 131 in relation to s. 124(1)(a) is contingent upon an assessment of the constitutionality of that section.

B. What does Section 124(1)(a) Mean?

- [85] Section 124(1) is found under the heading "General Offences" in Part 3 of the Act. Section 124 provides:

Contravention of Act

124 (1) Every person commits an offence who

- (a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;
- (b) escapes or attempts to escape from lawful custody or detention under this Act; or
- (c) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.

- [86] Section 125 specifies that s. 124(1) is a hybrid offence. For proceedings by indictment, the maximum fine is \$50,000 and the maximum term of imprisonment is two years.

- [87] Section 131 is also a general offence:

Counselling offence

131 Every person who knowingly induces, aids or abets or attempts to induce, aid or abet any person to contravene section 117, 118, 119, 122, 124 or 129, or who counsels a person to do so, commits an offence and is liable to the same penalty as that person.

[88] As applied to s. 124(1)(a), s. 131 makes it an offence to induce, aid or abet, attempt to induce, aid or abet, or counsel a person to contravene any provision of the Act that does not specify a penalty or fail to comply with a condition or obligation imposed under the Act.

[89] The scope of s. 124(1)(a) is extremely broad because the Act is not limited to its text. It includes the regulations, ministerial instructions and material incorporated by reference. Within this complex regulatory framework, there are thousands of mandatory requirements, conditions and obligations that could potentially ground charges under ss. 124(1)(a). That subsection is also very broad in comparison to subsections 124(1)(b) and (c), both of which create offences for specified conduct.

[90] With respect to legislative purpose, the Applicant submits that ss. 124(1)(a) and 131 share a common purpose, which is "to address and curtail abuse of the immigration system and to protect the safety, security and health of Canadian society." The Crown puts the purpose somewhat differently: "to maintain the integrity of the regulatory regime through effective enforcement". Both parties point to statements about the general importance of the Act's enforcement measures by the Minister of Citizenship and Immigration during the 2001 parliamentary debates.

[91] While neither section is referred to expressly, the Minister addressed enforcement of the Act in the House of Commons on June 13, 2001:

My goal as Minister of Citizenship and Immigration is and always has been to ensure we have legislation for the new millennium that will give us the tools we need to curb abuse while encouraging increased immigration to Canada. We want faster but fair decisions for refugee claimants. The bill would help us achieve those objectives.

My department has two mandates that are reflected in the bill. That is why I say the bill is balanced. The priority for my department is to bring in the people Canada needs, to reunite families, and to welcome those refugees who are in genuine need of our protection. However, my department also has an enforcement mandate to ensure that our laws have integrity and that those people who have no right to remain in Canada are stopped from coming.

[92] In the Senate, on October 4, 2001, she said:

If we are to function with integrity and maintain the confidence of Canadians, our immigration and refugee protection systems must have effective instruments to enforce the law.

[93] A general offence provision has been included in every federal immigration statute 1906, when it penalized violations of the statute, regulations, orders in council and proclamations for which no other offence was provided by a fine of \$100.

[94] Over time, as the statutory regime became more complex, the application of the general offence provision increased. Penalties also increased. In 1976, the immigration act was overhauled to reflect changing immigration policies. The general offence provision proposed in the bill read:

Every person who knowingly contravenes any provision of this Act or the regulations or any order or direction lawfully made or given thereunder for which no punishment is elsewhere provided in this act is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

[95] At the committee stage, the provision was described by government representatives as a "residual clause", a "catch-all penalty provision" or an "umbrella clause", whose purpose was to penalize contraventions of the statute or orders made under for which no specific penalty was provided in order to ensure that non-compliance would be penalized. The following statement by the Assistant Deputy Minister of Immigration at the Senate Standing Committee on Foreign Affairs on August 3, 1977 is illustrative:

It is, essentially, a backstopping. Those offences which are commonly committed or with which we have had some experience are specifically listed. But, clearly, a multitude of directions can be given under the regulations of the Immigration Act, as well as the act itself, and the purpose of the clause is to catch those directions which do not fall within other clauses of the [bill].

[96] The purposes of the Act relevant to enforcement are:

3(1) The objectives of the Act with respect to immigration are:

(f.1) to maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system;

(h) to protect public health and safety 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;

(2) the objectives of this Act with respect to refugees are

..

(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;

- (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.
- [97] Reading the text of s. 124(1)(a) in light of these interpretative contexts, its purpose is to maintain the integrity of the Canada's immigration and refugee protection regime by providing a criminal enforcement option for contraventions of the statute or conditions or obligations imposed under it. The availability of criminal enforcement prevents abuse of the immigration system and protects the safety, security and health of Canadian society.

C. Does Section 124(1)(a) Accord with the Principles of Fundamental Justice?

[98] The Applicant argues that s. 124(1)(a) is overbroad, arbitrary and vague.

1. Overbreadth

- [99] As I have said, an overbroad law is one whose effects overshoot its purpose so that it captures some conduct unrelated to that purpose: Bedford at para. 112. The Applicant argues that s. 124(1)(a) is overbroad because a "contravention" of the Act is not necessarily an abuse of the Act and does not necessarily endanger the safety, security or health of Canadian society. The Crown says that the Applicant misunderstands the role of general offence provisions in a regulatory regime. It says they are essential to ensure effective enforcement of the regime.
- [100] Both positions have merit. A general offence provision may be necessary for effective criminal enforcement of a regulatory regime. However, that does not immunize it from a Charter challenge on the ground of overbreadth. Even though the purpose of a general offence will be broad, s. 7 of the Charter mandates that its scope not exceed its purpose.
- [101] It is therefore necessary to consider whether s. 124(1)(a)'s scope overshoots its purpose of maintaining the integrity of the Canada's immigration and refugee protection system to prevent abuse of the immigration system and to protect the safety, security and health of Canadian society through criminal enforcement.
- [102] Section 124(1)(a) penalizes conduct that "contravenes" the Act or "fails to comply with a condition or obligation" imposed by it, for which no specific penalty is provided.
- [103] The Applicant submits that s. 124(1)(a) applies to all conduct that the Act mandates or prohibits, by using terms such as "must", "shall" and "may not". He includes a list of some hundred sections of the Act and regulations that meet this definition. He notes that ministerial instructions and material incorporated by reference into the Act may also impose "conditions or obligations" or identify "contraventions." He adds that many provisions authorize immigration officials and decision-makers to impose mandatory conditions or obligations, for example in granting a permit or licence, and that failure to comply with these would also be caught by s. 124(1)(a). He says that criminalizing this vast

range of conduct is unrelated to the purpose of s. 124(1)(a).

[104] The Applicant refers to six hypotheticals that he submits demonstrate that s. 124(1)(a) is overbroad. He says that the same hypotheticals demonstrate the overbreadth of s. 131 because any person who advises an individual about what to do in any of these hypothetical situations will violate that section.

[105] The Crown advances two arguments in response. First, it says that the Applicant cannot point to hypotheticals that have no connection to his case:

The applicant's arguments are replete with questions that have no connection to this case and invite the Court to effectively consider a wide ranging reference on the constitutionality of the entire [Act's] scheme. The Court should not permit such a sweeping review of [the Act] where the applicant has not challenged or shown how many of the obligations created under [the Act] that are relevant to the applicant's charges, are constitutionally deficient. The Court should not consider the applicant's various hypotheticals, involving unrelated provisions of [the Act].

[106] Instead, the Crown submits that the Applicant should be limited to hypotheticals that generally relate to the substantive allegations against him, characterizing s. 124(1)(a) a simply a "procedural mechanism for enforcement through designating the contravention a penal offence."

[107] The difficulty with this argument is that the counts in the Applicant's indictment relating to ss. 124(1)(a) and 131 do not identify any substantive contravention to which these penalty provisions attach. Each such count simply states that the Applicant on a specified date and location "did knowingly induce, aid or abet or attempt to induce, aid or abet" a specified person "to contravene s. 124(1)(a) of the Immigration and Refugee Protection Act , or did counsel that person to do so, contrary to section 131 of that Act." The indictment does not inform the Applicant about what substantive provision(s) of the Act forms the basis for the charges against him.

[108] The Crown's framing of the indictment invites the wholesale attack on the statute about which it now complains. Any deficiencies in the particular indictment are irrelevant to the constitutional validity of the impugned provisions and are not before me in this Charter voir dire. Having framed the indictment as it did, the Crown cannot restrict the Applicant's use of reasonable hypotheticals.

[109] I agree that this places the Court in an unfortunate position of having to consider very wide-ranging hypotheticals.

[110] The Crown's second argument is that, properly examined, the Applicant's hypotheticals do not demonstrate that s. 12(1)(a) (and s. 131) are overbroad.

[111] Analysis of a reasonable hypothetical must interpret the relevant statutory sections purposively to give full effect to legislative intent: *Khawaja* at paras. 43-45; *R. v. Terezakis*, 2007 BCCA 384 at paras. 28-33. In *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Morrissey*, 2000 SCC 39; and *R. v. Nur*, 2015 SCC 15, the Supreme Court of Canada establishes guidelines for the use of reasonable hypotheticals in the context of s. 12 of the Charter and the guarantee against cruel and unusual punishment:

- 1) A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility: *Goltz* at 506. It cannot be based on "remote or extreme examples": *Goltz* at 515.
- 2) The reasonable foreseeability of a hypothetical scenario is not confined to situations that are likely to arise in the general day-to-day application of a law. Rather, the inquiry is targeted on what may reasonably arise: *Nur* at paras. 67-68.
- 3) When construing hypotheticals, courts may be guided by real life cases, provided that the relevant facts are sufficiently reported: *Nur* at para. 72. However, courts are not bound to limit hypotheticals to the cases available to them: *Morrissey* at para. 33.

[112] In s. 7 overbreadth cases, the Supreme Court of Canada has said:

- 1) A reasonable hypothetical will not demonstrate that a law is overbroad if that hypothetical is rationally connected to the law's purpose: see *Moriarty* at para. 52.
- 2) When considering whether hypothetical conduct will be caught by a criminal offence, the court should interpret the impugned provision purposively, including by examining the offence's actus reus and mens rea and by looking to the terms of imprisonment and the stigma brought by the offence: see *Khawaja* at paras. 43-55.

[113] With these guidelines in mind, two of the Applicant's hypotheticals, the visitor to Canada who performs "work", and a person who makes a mistake on an application form are not reasonable hypotheticals because they are extreme examples that would be precluded by a purposive and contextual reading of the provision. The remaining four are reasonable hypotheticals: (1) a permanent resident who breaches a residency obligation; (2) a student who stops studying based on medical advice; (3) a temporary resident whose application to extend their status is refused and does not leave; and (4) a failed refugee claimant. After addressing the first two hypotheticals, I will consider whether these four hypotheticals demonstrate that some conduct that s. 124(1)(a) penalizes is not rationally connected to its purpose.

a) Unreasonable Hypotheticals

[114] In this hypothetical, the Applicant posits a visitor who comes to Canada and performs "work" such as yard work, babysitting, or remote work for their foreign employer. Section 2 of the Regulations defines "work" as

An activity for which wages are paid or a commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.

[115] Interpreting the term purposively, it is intended to protect access to the Canadian labour market for Canadians and permanent residents. Temporary yard work and babysitting are de minimus examples that could not reasonably be found to be "work" that visitors are prohibited from performing. Working for one's foreign employer while visiting in Canada does not take away any employment opportunity from Canadians or permanent residents and is not "work".

[116] In his "mistake on an application form" hypothetical, the Applicant points to the many mandatory requirements for making an immigration application as an example of s. 124(1)(a)'s overbreadth. For example, a person making a permanent resident card application "must" submit photos of a specified size, include specific information, and "must" make the application in Canada.

[117] Read purposively, the mandatory language used in these provisions simply relates to what the person must do to complete the application so that it will be accepted as a valid application. The use of mandatory language in this context does not identify a contravention of the Act. There is no realistic possibility that a person who makes a mistake on an application form would be charged under s. 124(1)(a).

[118] In sum, neither of these hypotheticals identify circumstances to which s. 124(1)(a) applies.

b) Reasonable Hypotheticals

[119] I accept that breach of a residency obligation, failure to pursue one's studies when in Canada on a student visa, failure to leave after the expiry of a temporary visa and remaining in Canada after being denied refugee status are all reasonable hypotheticals that would attract the criminal enforcement sanction in s. 124(1)(a). In order to decide whether any of them demonstrate that the provision is overbroad, it is necessary to explain each requirement.

i. Residency Obligation

[120] Section 28 imposes a residency obligation on permanent residents:

Residency obligation

28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

Application

(2) The following provisions govern the residency obligation under subsection (1):

(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are

- (i) physically present in Canada,
 - (ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,
 - (iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,
 - (iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or
 - (v) referred to in regulations providing for other means of compliance;
- (b) it is sufficient for a permanent resident to demonstrate at examination
- (i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;
 - (ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and
- (c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.
- [121] In order to have contravened the Act, a person must have been out of Canada for over 730 days in the applicable five-year period for a purpose other than accompanying family, being employed full-time by a Canadian business or being a family member of a permanent resident employed by a Canadian business. The person must also be in a situation that does not involve a child or where an officer considers that a child's best interests do not justify the breach of the residency obligation. An appeal to the Immigration Appeal Division (IAD) lies from such a determination and relief can be granted on humanitarian and compassionate grounds.[4] There is no breach until that process is complete. Finally, since a person can apply to renounce their permanent resident status under s. 46(1)(e), this hypothetical person would have chosen not to do so. Only in these circumstances could the person be prosecuted under s. 124(1)(a).
- [122] The Applicant points to the fact such prosecutions do not occur in practice as evidence that Parliament did not intend criminal consequences to attach to breach of permanent residency obligations. However, enforcement practices neither cure nor establish unconstitutional overbreadth.

[123] The question is whether attaching a criminal sanction to the hypothetical person who contravenes s. 28 is rationally connected to the purpose of s. 124(1)(a), which is to maintain the integrity of the Canada's immigration and refugee protection regime by providing a criminal enforcement option. In my view it is. Prosecution under s. 124(1)(a) of a permanent resident who has not complied with any of the available means to satisfy the residency obligation, has been unsuccessful on appeal and refuses to renounce their status is rationally connected to maintaining the integrity of the immigration system.

ii. Student visa holder who stops studying based on medical advice

[124] Student visa holders are required to "actively pursue" their studies: Immigration and Refugee Protection Regulations, SOR/2002-227, r. 220.1(1). The Applicant posits an undergraduate student who develops pregnancy complications and stops studying on the advice of her doctor. As the student's boyfriend is not a "family member" within the meaning of the Act, the student could be issued a removal order.

[125] Both the Applicant and the Crown point to various ways that this situation could be addressed short of contravening the Act within the meaning of s. 124(1)(a). The Applicant points to the introduction in January 2019 of guidelines authorizing leave from studies, and the discretion given to officials to cure potential breaches by granting temporary resident permits. The Crown points to the fact that entry to Canada was granted for the specific purpose of studying. If that purpose no longer exists, the student could apply to change her status (for example, to visitor). She might also have a due diligence defence.

[126] With this hypothetical, the Applicant again suggests that criminal enforcement is unnecessary and/or inappropriate, concluding: "This scheme simply does not sit comfortably in a criminal enforcement regime".

[127] However, the fact that the Act contains numerous and complex administrative enforcement mechanisms that are used far more often than s. 124(1)(a) does not demonstrate that it is unconstitutionally overbroad. If the hypothetical student does not resume her studies, does not change her status to reflect what she is doing, and does not leave Canada, criminal prosecution under s. 124(1)(a) is rationally connected to maintaining the integrity of the immigration and refugee protection system through a criminal enforcement option.

iii. Temporary Resident who Overstays

[128] Anyone in Canada as a temporary resident is required to leave Canada at the end of their authorized period of stay. However, the person may apply to extend their stay and, if the decision has not been made before the expiry of the authorized stay, Regulation 183(5) extends the authorization until the decision is made. At that point, either the individual will be able to stay for a new period or they will have to leave. The Applicant says that failing to leave on the day of the decision means that the individual is subject to prosecution under s. 124(1)(a), which could not have been Parliament's intention.

[129] I agree with the Crown that this hypothetical does not demonstrate overbreadth. Requiring a temporary resident to leave Canada at the end of their authorized period of stay after having had an opportunity to extend it is closely connected to the purpose of maintaining the integrity of the immigration and refugee protection system. Charging the temporary resident who does not leave on the day of the decision under s. 124(1)(a) is not a reasonable hypothetical. An individual may be able to justify their failure to leave in a particular case, but the availability of a criminal enforcement mechanism for a person who continues to remain in Canada after a decision denying an extension is rationally connected to the legislative purpose of s. 124(1)(a).

iv. Refugee Whose Claim is Denied

[130] In his written submissions, the Applicant says that all refugee claimants contravene the Act "simply by virtue of making a refugee claim." As he conceded in oral argument, this is not accurate. Section 133 of the Act expressly protects anyone with a pending or approved refugee claim from prosecution, including under s. 124(1)(a). This includes any contravention related to the person's entry into Canada.

[131] Section 133 protects the individual until their claim is finally determined and all appeals are exhausted.

[132] The Applicant is correct that some individuals who could have had valid refugee claims are denied refugee status because conditions in their country have changed, there is some other reason that they are inadmissible to Canada (for example, they committed a serious non-political crime), or they are barred from making a claim here because of the safe third-country agreement. He also points to the protections for refugees in Canada's international treaties and in the objects of the Act.

[133] Any refugee protection system must have a mechanism for determining who is and is not a refugee. Once it has been finally determined that a person is not a refugee, then the integrity of Canada's immigration and refugee protection system requires enforcement of that determination. This is not to say that every failed refugee claimant should be criminally prosecuted. It is simply to say that the availability of the criminal prosecution option in s. 124(1)(a) is rationally connected to the purpose of the provision.

v. Conclusion on Reasonable Hypotheticals

[134] As I understand it, the Applicant's position is that none of the conduct illustrated by the reasonable hypotheticals should ever be subject to criminal sanction. He makes this point most forcefully in relation to the first reasonable hypothetical, saying that breaching permanent residency requirements should never be subject to criminal sanction because losing that status (and presumably being required to leave Canada) are sufficient to maintain the integrity of the immigration system.

[135] It is true that criminal sanctions are different from administrative sanctions. Generally speaking, the possibility of incarceration is one of the greatest deterrents to engaging in prohibited conduct. With each of these four hypotheticals, the Applicant is not so much demonstrating how the provision overshoots its purpose, as he is questioning the purpose of s. 124(1)(a) in criminalizing the conduct to which it attaches. An overbreadth argument does not permit evaluation of a legislative objective, it only asks whether the scope of the provision impermissibly broad in light of the objective the legislature has chosen: *Moriarity* at para 30.

[136] At root, the Applicant's overbreadth submissions question the validity of Parliament's decision to continue to include general criminal enforcement options in the Act. He submits that, in order to attach criminal sanctions to conduct, Parliament must turn its mind to the specific conduct it intends to criminally penalize and cannot create a general offence. As I have said, this submission cannot be advanced under the overbreadth doctrine.

[137] I conclude that s. 124(1)(a) and consequentially s. 131 are not overbroad.

2. Arbitrariness

[138] Section 124(1)(a) is not arbitrary. As stated in *Bedford*, an arbitrary law is one where the effect of the law on the individual is unrelated to the law's purpose:

[111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (*Stewart*, at p. 136). A law that imposes limits on these interests in a way that bears no connection to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

[139] For example, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 the accused challenged a criminal law that required abortions to be approved by an accredited hospital's therapeutic abortion committee. The Supreme Court held that the purpose of the law was protection of women's health. However, it found that the approval requirement did not contribute to the law's objective and actually undermined it by causing delays that were detrimental to women's health. Therefore, the law was arbitrary: *Morgentaler*, cited in *Bedford* at para. 98.

[140] In *R. v. Malmo-Levine*, 2003 SCC 74 the law criminalizing possession of marihuana was challenged under s. 7 of the Charter. The Court accepted that the purpose of the law was prevention of harm to public health and safety. It rejected the appellants' argument that the law was arbitrary because it did not prohibit possession of other similarly harmful substances such as alcohol and tobacco. The Court held that as a principle of fundamental justice, arbitrariness does not mandate similar legislative treatment of similar situations. As

long as the prohibition was rationally connected to the law's purpose, it was not arbitrary: Malmo-Levine at paras. 136-140.

[141] Here, penalizing persons who contravene provisions of the Act for which a penalty is not otherwise specifically provided is obviously rationally connected to the purpose of maintaining the integrity of the immigration and refugee protection regime through effective criminal enforcement. I conclude that s. 124(1)(a) is not arbitrary.

3. Vagueness

[142] As discussed above in relation to s. 117, vagueness as a principle of fundamental justice requires that the essential elements of criminalized conduct be sufficiently precise that (1) a person can know in advance whether they are "entering an area of risk for criminal sanction" and (2) law enforcement discretion is meaningfully limited: Canadian Foundation at para. 16.

[143] A broad definition is not a vague definition. Use of a general term (for example, "impairment", "public safety" or "security of Canada") does not make the law vague. As long as a provision is capable of meaningful judicial interpretation, it is not vague: Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 at 1044 (Lamer CJC concurring); Nova Scotia Pharmaceutical at 643.

[144] The very high threshold for establishing that a law is unconstitutionally vague is illustrated by the fate of vagueness claims at the Supreme Court of Canada. Other than two cases involving challenges to the Code's bail provisions[5], the Supreme Court has consistently rejected claims that laws are unconstitutionally vague:

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 [Prostitution Reference] (terms "prostitution", "keeps" a bawdy-house, "communicate" and "attempts to communicate" in Criminal Code sex solicitation provisions are not vague);

R. v. Nova Scotia Pharmaceutical Company, [1992] 2 SCR 606 (term "unduly" in the Combines Investigation Act offence of conspiracy to prevent or lessen competition unduly was not vague, nor was the accompanying interpretive provision);

United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901 (term "criminal contempt" in offence of contempt of court not vague);

P. (D.) v. S.(C.), [1993] 4 SCR 141 (statutory "best interests of child" standard under the Civil Code of Lower Canada not vague);

R. v. Finta, [1994] 1 S.C.R. 701 (Code war crimes and crimes against humanity provisions not vague, nor were the definition sections "crime against humanity" and "war crimes");

R. v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 (term "contaminant in the natural environment in provincial environmental law not vague);

Ruffo v. Conseil de la Magistrature, [1995] 4 S.C.R. 267 (Judicial Code of Ethics requirement that judges act in a "reserved manner" not vague)

R. v. Lucas, [1998] 1 S.C.R. 439 (Code defamatory libel provisions not vague);

Winko v. Forensic Psychiatrist Institute, [1999] 2 S.C.R. 625 (term "significant threat to the safety of the public" in the Code provision permitting release of Not Criminally Responsible for Mental Disorder persons not vague);

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (Immigration and Refugee Protection Act's terms "danger to the security of Canada" and "terrorism" not vague);

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4: (term "reasonable under the circumstances" in Criminal Code provision authorizing parents and educators to use force against children not vague);

R. v. Levkovic, 2013 SCC 25 (term "child [that] died before birth" in Criminal Code offence of disposing of a dead body of a child, whether death before, during, or after birth not vague);

Wakeling v. United States of America, 2014 SCC 72 (term "administration of justice" in Criminal Code provision permitting allowing law enforcement officials to intercept and disclose wiretapped communications not vague);

R. v. Conception, 2014 SCC 60: (Criminal Code requirement that hospital "consent" to treatment order not vague).

[145] The vagueness analysis requires a court to "develop the full interpretive context surrounding an impugned provision" to determine whether it provides fair notice to individuals of the area of risk and meaningfully limits enforcement discretion. The court must then examine the challenged terms to see if they are sufficiently precise to provide a basis for legal debate: *Canadian Pacific* at 1070.[6]

[146] The notification element only requires that persons be able to identify an area of risky conduct at a high level of generality. In *Nova Scotia Pharmaceutical and Canadian Pacific*, the Supreme Court explained that this is a substantive rather than a procedural requirement. It is met where a person subjectively understands that "some conduct comes under the law": *Canadian Pacific* at 1075, citing *Nova Scotia Pharmaceutical* at 633-34.

[147] In *Nova Scotia Pharmaceutical* at 634, Gonthier J. explained the notice requirement this way:

Let me take homicide as an example. The actual provisions of the Criminal Code dealing with homicide are numerous (comprising the core of ss. 222-240 and other related sections). When one completes the picture of the Code with case law, both substantive and constitutional, the result is a fairly intricate body of rules. Notwithstanding formal notice, it can hardly be expected of the average citizen that he know the law of homicide in detail. Yet no one would seriously argue that there is no substantive fair notice here, or that the law of homicide is vague. It can

readily be seen why this is so. First of all, everyone (or sadly, should I say, almost everyone) has an inherent knowledge that taking the life of another human being is wrong. There is a deeply-rooted perception that homicide cannot be tolerated, whether one comes to this perception from a moral, religious or sociological stance. Therefore it is expected that homicide will be punished by the State. Secondly, homicide is indeed punished by the State, and homicide trials and sentences receive a great deal of publicity.

I used homicide as an example, because it lies so at the core of our criminal law and our shared values that substantive notice is easy to demonstrate. Similar demonstrations could be made, at greater length, for other legal provisions. The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

[148] In *Canadian Pacific*, the Supreme Court found that the prohibition on releasing a "contaminant into the natural environment" that is likely to impair that environment was not vague. The Court found that the impugned provision was so closely related to the societal value of environmental protection that "substantive notice of the prohibition in s. 13(1)(a) is easy to demonstrate": *Canadian Pacific* at 1076. The Court also considered the regulatory nature of the offence relevant. It noted that in regulatory statutes, legislators might enact either very specific prohibitions (for example, against releasing specified amounts of specified substances into the environment) or more general ones (for example, prohibiting pollution), relying on the courts to interpret the meaning of general terms. In some contexts, such as environmental regulation, the latter approach may be preferable: *Canadian Pacific* at 1073-74.

[149] Gonthier J. succinctly stated the standard for limitation on law enforcement discretion, in *Nova Scotia Pharmaceutical* at 636:

A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

[150] When examining the challenged terms to see if they provide a basis for legal debate, the court may use principles of statutory interpretation, such as the presumptions against absurdity and against attaching penal consequences to trivial or minor violations, and the principle that general words should be interpreted strictly: *Canadian Pacific* at 1081-83. The court may also refer to international treaty obligations, social consensus and expert evidence: *Canadian Foundation* at paras. 31, 36.

- [151] In summary, a law is not unconstitutionally vague if interpreted contextually it (1) identifies in a general way an area of risky conduct tied to a societal value; (2) delineates the limits of the prohibited conduct such that conviction is not the inevitable result of a decision to prosecute; and (3) the challenged terms are capable of judicial interpretation using interpretive resources.
- [152] The Applicant argues that the use of the phrase "contravenes a provision of this Act" in s. 124(1)(a) is vague. He says that the Act's complex administrative regime is so infused with discretionary "relief valves" in the form of exceptions, protections and administrative decision-making that it is not possible for a person to know when they have "contravened" it or failed to comply with a condition or obligation under it. Further, he says that the term "Act" is vague because it is not possible for an individual to know what it includes.
- [153] The Applicant's argument misconceives the very limited scrutiny afforded by vagueness doctrine under s. 7 of the Charter. Section 124(1)(a) is a general offence provision. Unlike specific offences, which expressly state the essential elements of the offence, general offences are not self-contained. They attach to other provisions of the statute that do create substantive obligations and make contravention of them an offence.
- [154] As discussed in *Canadian Pacific* at 1073-74, it is open to a legislature to enact a general prohibition rather than a series of specific offenses. I am not aware of any other case where as broad a general offence provision as s. 124(1)(a) has been challenged as vague contrary to s. 7. The Crown referred to *R. v. Ivy Fisheries Ltd.*, 2006 NSPC 5 [*Ivy Fisheries*], which concerned charges under the Fisheries Act, R.S.C. 1985, c F-14. However, the issue was not whether the general offence provision violated s. 7 of the Charter, it was whether the statute authorized the creation of offences by regulation. The Court held that the general offence section of the statute authorized the creation of offences by regulation: *Ivy Fisheries* at paras. 26-27.
- [155] When applied to a general offence provision, contextual interpretation in a vagueness analysis requires that a general offence provision be interpreted in the context of the prohibitions to which it attaches. Section 124(1)(a) applies to both the immigration and the refugee protection provisions of the Act, penalizing contraventions in both areas. Immigration and refugee protection are unquestionably important Canadian social values. Just as was found in *Nova Scotia Pharmaceutical* with respect to prohibiting conspiracies in restraint of trade, and in *Canadian Pacific*, with respect to prohibiting pollution, conduct relating to foreigners entering and remaining in Canada is an area that individuals subjectively understand to be subject to legal restrictions. As the cases make clear, that is sufficient notice of risk for the purposes of the s. 7 vagueness analysis.

- [156] Section 124(1)(a) read in conjunction with the substantive prohibitions to which it applies also adequately delineates the limits of prohibited conduct for the purposes of a vagueness analysis. The fact that enforcement officials can choose between criminal and administrative remedies does not make the law vague: *Nova Scotia Pharmaceutical* at 644-45.
- [157] The fundamental problem with the Applicant's vagueness argument is that s. 124(1)(a) has almost no substantive content. Read on its own, it does not delineate any area of risk or limit law enforcement discretion because it is not self-contained. It can only operate in conjunction with another provision of the Act that specifies what conduct is prohibited or sets establishes a mandatory condition or obligation. Standing on its own, the provision is not vague in a constitutional sense; it is empty.
- [158] The Applicant's argument that the terms "contravention" and "Act" are vague must also fail. His argument that it is very difficult to know what constitutes a "contravention" of the Act is supported by his examples of contraventions, many of which the Crown argued were not contraventions. This in itself demonstrates that the meaning of "contravention" is a matter of legal debate and capable of judicial interpretation. "Act" is a defined term. The fact that it is very broadly defined does not make it vague.
- [159] I conclude that s. 124(1)(a) is not vague within the meaning of s. 7 of the Charter. It follows that s. 131 is not vague insofar as it applies to s. 124(1)(a).

4. Remedy

- [160] I have found that s. 117 is unconstitutionally overbroad and cannot be justified under s. 1 of the Charter. The Crown argues that a constitutional remedy is unnecessary because the Aid Activities recognized in *Christurajah* and *Rajaratnam* are common law defences that would necessarily apply to the present s. 117, effectively curing its constitutional defect. In addition, the Crown led evidence that since the *Appulonappa* decision, government officials have treated conduct protected by the aid defences as excluded from the scope of s. 117.
- [161] In *Appulonappa*, the Supreme Court considered it necessary to grant a constitutional "reading down" remedy, declaring under s. 52 of the Constitution Act, 1982 that the former s. 117 was of no force and effect to the extent of its proven inconsistency with s. 7 of the Charter. It defined that inconsistency as follows:
- [84] The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents.

- [162] Throughout Rajaratnam, the Court of Appeal refers to the Aid Activities as "the Appulonappa exceptions". The Court of Appeal (as well as the parties) accepted that the source of the Aid Activities exceptions was the constitutional remedy, not the common law. The fact that prosecutorial discretion may be exercised to prevent prosecution of persons who can invoke the aid defences does not cure the constitutional problem here any more than it did in Appulonappa.
- [163] Since s. 117 is a new law, the declaration of invalidity granted in Appulonappa does not automatically apply to it. In the alternative, the Crown argues that a "reading down" remedy similar to Appulonappa is appropriate here. The Applicant disagrees, citing Parliament's failure to amend s. 117 to conform to the ruling in that case.
- [164] I have some sympathy for the Applicant's position. Ideally, laws found unconstitutional by the courts should not remain in the statute books and the public should not have to read court cases to figure out what the law is. However, the practical reality of legislative amendments means that statutes are not changed quickly or easily, even where the court has identified a constitutional defect.
- [165] Where a court can identify the constitutional defect with precision, as in this case, a reading down remedy is appropriate. Reading down in this situation is not judicial interference with the role or timetable of the legislature in enacting and amending laws: see *Ontario (Attorney General) v. G*, 2020 SCC 38 at paras 108-116. The fact that government officials are continuing to follow the guidance in Appulonappa does not cure the unconstitutional overbreadth in the present s. 117, but it suggests that reading down would be workable in practice. The Applicant has not demonstrated any overbreadth beyond what was found in Appulonappa. A reading down remedy in this case corrects a constitutional flaw while ensuring that the important purpose of prohibiting human smuggling, including compliance with Canada's international obligations, continues to be served.

VII. CONCLUSION

- [166] Pursuant to s. 52(1) of the Constitution Act, 1982, I declare that s. 117 of the Act is of no force and effect to the extent that it is inconsistent with s. 7 of the Charter by reason of overbreadth. The overbreadth is in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family. Section 117 is read down to exclude persons who organize induce, aid or abet such persons to enter Canada, while knowing or being reckless as to whether their entry would constitute a contravention of the Act. As it applies to s. 117, s. 131 is read down to the same extent.

"Iyer J."

- [1] Although Mr. Boule's submission refers to gross disproportionality, another principle of fundamental justice, it is not included in his Notice of Constitutional Question and the argument is not developed in any detail. I agree with the Crown that it is not before me and I will not address it.
- [2] The wording of s. 121(a) has been changed slightly. It now requires consideration of whether: "bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence".
- [3] Flagpoling occurs where a person applies for renewal of a work or study permit by leaving Canada at a U.S. border crossing and then immediately seeks re-entry, relying on the immigration officer's discretion to regularize their status. This avoids the time it takes to file an application. See *Paranych v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 158 at para. 5.
- [4] In *Ng v. Minister of Citizenship and Immigration*, [2019] I.A.D.D. No. 416, the IAD granted an appeal justifying an absence from Canada of 27 years on humanitarian and compassionate grounds.
- [5] The two exceptions are *R v Morales*, [1992] 3 S.C.R. 711 and *R v Hall*, 2002 SCC 64. Both cases concerned the grounds to justify pre-trial detention of an accused in s. 515(10) of the Criminal Code. Although the vagueness analysis was conducted under s. 11(e) of the Charter (right not to be denied reasonable bail without just cause), the Court expressly applied the vagueness doctrines developed under s. 7. Neither of these cases is cited in subsequent Supreme Court cases addressing s. 7 vagueness claims.
- [6] In subsequent cases such as *Canadian Foundation for Youth and Levkovic*, the Supreme Court of Canada did not expressly distinguish these inquiries. However, I find it useful to do so in this case.

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