



“Proud to aid and abet refugees” campaign

Backgrounder, November 2007

Background

On 26 September 2007 Janet Hinshaw-Thomas was arrested at the Lacolle (Québec) border point. Ms Hinshaw-Thomas is the director of PRIME - Ecumenical Commitment to Refugees, a US church based refugee-serving organization. She had come to the border to accompany 12 Haitians who wanted to make a refugee claim in Canada. She was not acting clandestinely, nor was she acting for profit. She was detained overnight and charged the next day in court under section 117 of the *Immigration and Refugee Protection Act*.

S. 117 states that “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.”

The 12 Haitians were admitted into Canada to pursue their claims, according to the law.

The charges, the first laid in Canada against a humanitarian worker for people smuggling, led to strong public indignation. Among those expressing their grave concerns were:

- Former Cabinet ministers of different parties (see attached letter)
- Leaders of national faith communities (see attached letter)
- The Canadian Bar Association (letter available at <http://www.cba.org/CBA/submissions/pdf/07-50-eng.pdf>)
- Amnesty International (initial release available at <http://tinyurl.com/26z6wy>)
- The Refugee Lawyers Association (release available at <http://www3.sympatico.ca/martinj1/>)
- The Canadian Council for Refugees (initial release available at <http://www.ccrweb.ca/eng/media/pressreleases/27sept07.htm>)

The charges against Janet Hinshaw-Thomas were dropped – without explanation – on 8 November. However, the threat of similar charges exists as long as the law is not amended.

The “**Proud to aid and abet refugees**” campaign is therefore launched with the goals of achieving:

- a) A commitment from the government not to prosecute people acting on humanitarian motives.
- b) A review by the government of 117(9)(d) cases currently pending, with respect to possible humanitarian motives.
- c) An amendment to the law.

“Proud to aid and abet refugees” campaign

Proposal for legislative amendment

117. (1) No person shall knowingly **and for material benefit** 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.

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

(b) The Attorney General of Canada may not delegate the power conferred by this subsection.

Campaign webpage:

<http://www.ccrweb.ca/documents/aidandabet.htm>



ISSUES RAISED BY THE PROSECUTION

Issue #1 – offering safe haven to refugees

The *Immigration and Refugee Protection Act* includes in its objectives “to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted”, “to fulfil Canada’s international legal obligations with respect to refugees”, to grant “fair consideration to those who come to Canada claiming persecution” and “to offer safe haven to persons with a well-founded fear of persecution”. (IRPA 3(2))

Janet Hinshaw-Thomas, acting on humanitarian motives, assisted some individuals to present themselves at a Canadian port of entry so that they could make a refugee claim as provided for in the law. She was therefore furthering the objectives of the Act with respect to refugees.

The eminent refugee law scholar Professor James Hathaway pointed out in his recent book on international refugee law: "Importantly, however, Canada’s reluctance to impose those penalties [found in s. 117 IRPA] in practice against persons transporting refugee claimants in other than egregious cases is very much in line with expectations of the Convention’s drafters." Hathaway continues: "The drafters assumed [...] that governments would not exercise their authority to penalize those assisting refugees to enter an asylum country absent evidence that they had acted in an exploitative way, or otherwise in bad faith" (Hathaway, James (2005) 'The Rights of Refugees under International Law' Cambridge, Cambridge University Press, at 404-405).

The Minister of Citizenship and Immigration is responsible for overseeing the protection of refugees, according to the objectives in the Act and in compliance with international human rights obligations. There have been no public comments from the Minister to date on the implications for Canada’s humanitarian obligations when Canada prosecutes people for assisting refugees.

Issue #2 – role of Attorney General

IRPA 117 specifies that “No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.” (IRPA 117(4))

When the bill was being studied by Parliament in 2001, senior officials gave assurances that the consent of the Attorney General provided the necessary protection against prosecutions of people acting on humanitarian grounds:

Mr. John McCallum: [...w]e heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?

Mr. Daniel Therrien: The protection against such prosecutions is in subclause 117(4), which provides that no prosecution under the smuggling provision can

occur without the consent of the Attorney General, who, obviously, in deciding whether to prosecute, will weigh the motives of the people who have assisted others to come illegally into Canada. This is, again, what the current act provides, and there are relatively few prosecutions on smuggling, certainly no complaints I've heard that under the current regime, which would be repeated in the new regime, people who acted on humanitarian grounds have been prosecuted for smuggling. [CIMM, 17 May 2001, see below]

According to the Canadian Press, the Attorney General did not give his personal consent and denies any responsibility to withhold consent in cases where persons are acting on humanitarian motives.

“Federal Justice Minister Rob Nicholson told The Canadian Press last week he did not personally sign any warrant or authorization calling for the arrest of Hinshaw-Thomas, and as per policy, would not comment on the particular case.

"I will say that the law is clear that anyone who aids or abets individuals entering in this country without proper documentation is subject to a charge under the immigration and refugee act and the law is clear," Nicholson said." [Canadian Press, *Miscommunications led to arrest, American refugee advocate says*, 7 October 2007, <http://canadianpress.google.com/article/ALeqM5jBqJlid57wQvHssKiTWZcPabsPdg>]

Last year the power of the Attorney General to give consent was delegated to the new Public Prosecution Service of Canada, meaning that the Attorney General no longer makes the decision whether to prosecute or not. (Toronto Star, “Refugee smuggling charges dropped”, 9 Nov 2007, Nicholas Keung).

Issue #3 – Role of Canada Border Services Agency

The Canada Border Services Agency, reporting to the Minister of Public Safety, is responsible for enforcing the law, but also for upholding the humanitarian objectives of the IRPA, including to ensure that refugees are protected. Yet CBSA has been acting without regard to these latter responsibilities. Its spokesperson has said:

“There are no exceptions in the law for church-based or other human rights personnel” [Montreal Gazette, 27 Sept. 2007, <http://www.canada.com/montrealgazette/news/story.html?id=02346cb7-998c-4036-ba6c-650ecbd92132>]

"The law is quite clear. Organizing and aiding entry into Canada is an offence under Section 117 of the (act). We can't tolerate human smuggling. The CBSA (is) really going to continue its efforts to combat movement of people, and (this charge) is an example." [CTV, 29 Sept. 2007, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070929/smuggling_cha_rge_070929/20070929?hub=TopStories]

CBSA has also drawn public criticism recently from the UN Refugee Agency for “directing back” refugees, a further example of its lack of commitment to the protection of refugees: See “UNHCR Expresses Deep Concern over Canada's continued policy of Direct Backs”, 10 October 2007, <http://www.newswire.ca/en/releases/archive/October2007/10/c2460.html>

**Extract from Evidence, Standing Committee on Citizenship and Immigration
October 25, 2001**

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=55578>

Elinor Caplan (Minister of Citizenship and Immigration, Lib.): I'm pleased to answer the questions of the leader of the official opposition. I want him to know that there are 23 million refugees worldwide. Many flee for their lives from persecution with no documentation. Some use smugglers to help them flee. That's called humanitarian smuggling. It's something that is recognized in our law today. When it can be proven that someone assisted for humanitarian reasons, such as people fleeing persecution, the Minister of Justice does not prosecute in those cases. Often it is church groups and organizations that help people.

Extract from Evidence, Standing Committee on Citizenship and Immigration, Clause by Clause study of Bill C-11 (*Immigration and Refugee Protection Act*)

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=54916&Lang=1&PARLSES=371&JNT=0&COM=212>

Thursday, May 17, 2001

(On clause 117—*Organizing entry into Canada*)

Mr. John McCallum: I guess this is coming up in the NDP amendment anyway, but since we're on subclause 117(1), we heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?

Mr. Daniel Therrien: The protection against such prosecutions is in subclause 117(4), which provides that no prosecution under the smuggling provision can occur without the consent of the Attorney General, who, obviously, in deciding whether to prosecute, will weigh the motives of the people who have assisted others to come illegally into Canada. This is, again, what the current act provides, and there are relatively few prosecutions on smuggling, certainly no complaints I've heard that under the current regime, which would be repeated in the new regime, people who acted on humanitarian grounds have been prosecuted for smuggling.

The Chair: NDP-51n deals with this one. Go ahead, Judy.

Ms. Judy Wasylycia-Leis: We heard from many groups a concern about being charged and penalized for helping refugees coming into Canada at the border, and I hear the officials saying

that protections are provided in subclause 117(4) and that there are virtually no prosecutions as a result of someone acting for humanitarian reasons.

Mr. Daniel Therrien: There are none, actually, that I know of.

Ms. Judy Wasylycia-Leis: Okay, none. My argument would be that if such is the case and there still is this concern from groups, the way the act is now worded, you actually constrain them, make them think twice about helping people because of this provision. They do not want to end up where they're charged and have to go to the Attorney General of Canada to have their case dealt with humanely. Why not put it in the act? Why not add something to subclause 117(1) that actually says it doesn't apply to someone acting on humanitarian considerations. I would still move that.

Ms. Joan Atkinson: If I could speak to that, these offences on smuggling and trafficking are key elements of our contribution to the international fight to try to put an end to the smuggling and trafficking of human beings. We need to be able to have very strong offences, and I know everyone is very well aware of how we have highlighted these as being a part of the tools we need to deal with these issues of smuggling and trafficking.

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



14 November 2007

Hon. Stockwell Day, P.C., M.P., Minister of Public Safety and Emergency Preparedness
Hon. Diane Finley, P.C., M.P., Minister of Citizenship and Immigration
Hon. Rob Nicholson, P.C., Q.C., M.P., Attorney General of Canada
House of Commons
Ottawa, ON, K1A 0A6

Dear Ministers,

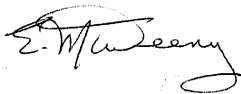
We are writing to request a meeting to discuss the need for measures to ensure that charges under s. 117 of the *Immigration and Refugee Protection Act* are not in the future laid against persons acting on humanitarian motives to help refugees.

While we welcome the decision to drop the charges against Janet Hinshaw-Thomas, the threat of similar charges continues to exist. We are aware that people across Canada who work with refugees have felt intimidated by the unprecedented charges laid against a humanitarian worker and are concerned that the law as it currently stands is so broad that it criminalizes many activities to assist refugees.

We are requesting that you publicly commit to ensure that no one else acting on humanitarian motives will be charged, that you introduce legislative amendments to this effect and that you review currently pending charges under s. 117 with respect to possible humanitarian motives.

This matter will be discussed at the upcoming fall consultation of the Canadian Council for Refugees, 29 November – 1 December. A decision from you on your availability for a meeting would be greatly appreciated in time for the consultation.

Yours sincerely,



Elizabeth McWeeny
President
Canadian Council for Refugees



Alex Neve
Secretary General
Amnesty International Canada

6 November 2007

Hon. Stockwell Day, P.C., M.P., Minister of Public Safety and Emergency Preparedness
Hon. Diane Finley, P.C., M.P., Minister of Citizenship and Immigration
Hon. Rob Nicholson, P.C., Q.C., M.P., Attorney General of Canada
House of Commons
Ottawa, ON, K1A 0A6

Dear Ministers,

We, the undersigned former Ministers of Immigration and Attorneys General, are writing to express our grave concern about the arrest of US humanitarian worker Janet Hinshaw-Thomas on charges of human smuggling.

Section 117 of the *Immigration and Refugee Protection Act*, like its predecessor provision, section 94 of the 1976 *Immigration Act*, was intended to target people-smugglers – the criminals and criminal organizations that profit from aiding or abetting people to cross the border into Canada illegally. While the language of both the current and the previous provisions has always been broad, this was understood as necessary to ensure sufficient flexibility to enable the prosecution of those who cruelly exploit the desperation of others for financial gain, no matter what methods they used. However, as individuals who were once responsible for the application and enforcement of these provisions, we can attest to the fact that they were never designed or intended to allow for the prosecution of humanitarian aid workers.

There is a crucial distinction to be made between the criminal organizations that derive enormous profits from smuggling human beings across borders illegally, and the numerous refugee assistance organizations and dedicated individuals who assist those fleeing persecution and torture to seek protection from Canada via our refugee determination process. The smugglers are the legitimate and intended targets of s. 117; the latter are not.

Section 117(4) of IRPA, like section 94.3 of the previous legislation, requires the consent of the Attorney General prior to the initiation of proceedings against any person under the relevant provisions. We have always understood the purpose of this requirement as a safeguard against the inappropriate and improper targeting of individuals who, like Ms. Hinshaw-Thomas, merely assist refugee claimants to access the system that Canadian law has created specifically for the adjudication of claims for refugee protection.

.../2

The arrest of Janet Hinshaw-Thomas suggests that this safeguard has now proven inadequate. Whatever the merits of Ms. Hinshaw-Thomas' particular case, the fact of her arrest telegraphs the deeply disturbing message that it is now illegal to assist asylum seekers to ask Canada for protection from persecution. This message is inimical to the achievement of the IRPA's objectives of fulfilling "Canada's international legal obligations with respect to refugees" and granting "as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution". Individuals like Ms. Hinshaw-Thomas play a vital role in helping ensure that Canada does in fact comply with its international human rights obligations, including those dealing with refugee protection.

To ensure that asylum seekers continue to receive the assistance they need and which is their legal right, we urge the Government of Canada to ensure that those with humanitarian motives who assist asylum-seekers to access Canadian refugee determination procedures will not be charged with aiding, abetting, or otherwise 'smuggling' within the meaning of s. 117 of IRPA. Appropriate regulatory and legislative changes should be adopted.

As former Ministers of Immigration and Attorneys General we are proud of Canada's long-standing commitment to upholding our international legal obligations and our hard-earned reputation for protecting refugees. It is our utmost hope that the present government will act quickly to expunge this stain on our reputation before it sets.

Yours truly,

The Hon. Lloyd Axworthy, P.C., O.C., O.M., B.A., M.A., Ph.D.
Minister of Employment and Immigration, 1980.03.03 - 1983.08.11 and 1993.11.04 - 1996.01.24

The Hon. Elinor Caplan, P.C.
Minister of Citizenship and Immigration, 1999.08.03 - 2002.01.14

The Right Hon. Charles Joseph (Joe) Clark, P.C., C.C., A.O.E., B.A., M.A., LL.D.
Minister of Justice and Attorney General of Canada (Acting), 1988.12.08 - 1989.01.29

The Hon. Irwin Cotler, P.C., O.C., B.A., B.C.L., LL.M., LL.D., Ph.D.
Minister of Justice and Attorney General of Canada, 2003.12.12 - 2006.02.06

The Hon. Flora Isabel MacDonald, P.C., C.C., O.Ont.
Minister of Employment and Immigration, 1984.09.17 - 1986.06.29

The Hon. Allan Rock, P.C., LL.B.
Minister of Justice and Attorney General of Canada, 1993.11.04 - 1997.06.10

1 November 2007

Hon. Stockwell Day, PC, MP, Minister of Public Safety and Emergency Preparedness
Hon. Diane Finley, PC, MP, Minister of Citizenship and Immigration
Hon. Rob Nicholson, PC, MP, Attorney General of Canada
House of Commons
Ottawa, ON, K1A 0A6

Dear Ministers,

We are writing to express our grave concern about the arrest of US humanitarian worker Janet Hinshaw-Thomas on charges of human smuggling.

As leaders of faith communities deeply committed to justice for refugees, we are compelled to speak out about our obligation to assist our fellow human beings who are fleeing persecution. Helping someone to make a refugee claim in Canada is not only a response to this call to assist others but also, we believe, consistent with the fundamental objectives of the *Immigration and Refugee Protection Act* and with the best elements in Canada's humanitarian traditions.

The possibility that the humanitarian act of assisting refugees can be treated as a criminal activity with a maximum punishment of life imprisonment is a serious flaw in the *Immigration and Refugee Protection Act*.

Some representatives of our faith communities raised concerns about the possibility of such charges while the Act was before Parliament. The government at that time gave assurances that the provision would not be used against persons acting on humanitarian motives. The recent arrest of Janet Hinshaw-Thomas demonstrates the contrary.

The fact that she faces the prospect of a trial and a criminal conviction for her act of compassion towards others is clearly an injustice. We are also mindful of the effect these charges have on others who are helping to protect refugees. Individuals and organizations serving refugees must now live with the fear of criminal charges, instead of being honoured for working to uphold Canada's humanitarian ideals.

.../2

We urge you to ensure that the charges against Janet Hinshaw-Thomas are dropped and to adopt appropriate regulatory and legislative changes so that in the future those with humanitarian motives who assist refugee claimants will be excluded from these charges.

Yours truly,

Dr. Ken Bellous
Executive Minister
Baptist Convention of Ontario & Quebec

Donald Peters
Executive Director
Mennonite Central Committee Canada

Most Rev. Roger Ébacher
Archbishop of Gatineau
And Chairman of the Human Rights
Committee
Canadian Conference of Catholic Bishops

Nora Sanders
General Secretary, General Council
United Church of Canada

Rabbi Edward Elkin
First Narayever Congregation, Toronto

Sister Donna Geernaert SC
President, Canadian Religious Conference

The Most Reverend Fred Hiltz
Archbishop and Primate
Anglican Church of Canada

Bishop Susan Johnson
Evangelical Lutheran Church in Canada

The Rev Dr J.H. Hans Kouwenberg
Moderator of the 133rd General Assembly
Presbyterian Church in Canada

Svetlana S. MacDonald
Clerk
Canadian Friends Service Committee
(Quakers)

Dr Gary Nelson
General Secretary
Canadian Baptist Ministries (CBM)

Are we all smugglers now?

Published in the Globe and Mail, October 9, 2007 – Page A21

By ANDREW BROUWER, MITCHELL GOLDBERG, JANET DENCH

On Sept. 27, Canadian border officials laid people-smuggling charges against Janet Hinshaw-Thomas. She is alleged to have aided and abetted the entry to Canada of 12 non-Canadians.

People smugglers are a mixed bunch, but many of them are truly among the lowest of the criminal low - pimps, abusers, exploiters who prey on the most vulnerable members of some of the most downtrodden societies on Earth. So one might have expected advocates to cheer at the arrest. Instead, human-rights, church, lawyers' organizations are crying foul. Why?

The answer is pretty straightforward: The border officials went after the wrong person. Ms. Hinshaw-Thomas is a human-rights advocate who has for the past 24 years provided humanitarian assistance to refugees. When she was arrested, she was in the process of handing over to Canadian border officials a group of 12 Haitian asylum seekers who were at risk of deportation from the United States to Haiti, where they feared they would be persecuted or killed.

They wanted to ask Canada to protect them - a request they are entitled to make under international law as well as the Immigration and Refugee Protection Act. All Ms. Hinshaw-Thomas did was advise them of their right to make a claim under Canadian law, and drive them up to (not across!) the border, where they could be interviewed by Canadian officials to determine whether they qualified for consideration (they did).

Back when the current legislation was being debated, the all-party House of Commons committee reviewing the bill expressed concerns: MP John McCallum worried the provision might be used against "reverends and saintly people ... the last people in the world that we would want to prosecute." The committee received assurances from then-immigration minister Elinor Caplan, and senior immigration officials, that no such absurdity could come to pass. They kept their word - until now. Ms. Hinshaw-Thomas is the first humanitarian aid worker to be charged under the provision since the law was implemented in 2002.

Given the charges clearly violate the legislators' intention, we should expect that Attorney-General Rob Nicholson will move quickly to drop the charges against Ms. Hinshaw-Thomas. It is a misuse of the legislation. Everyone who assists refugees could be subject to prosecution for "aiding and abetting" under the interpretation being applied to Ms. Hinshaw-Thomas. Advocates and lawyers are insisting the government issue policy guidelines or amend the law to ensure this kind of charge never happens again.

But the fact the charges were even laid raises a disturbing question: Has our government turned its back on refugees?

The arrest is part of a larger pattern of government action undermining the asylum program. Canada has closed the door on thousands of refugees through the Safe Third Country

Agreement with the U.S., the interdiction of refugees overseas and restrictive visa policies that target refugee-producing countries. Even refugees who overcome those obstacles find the determination system weakened by the failure to implement the refugee appeal division.

During the Holocaust, Swedish diplomat Raoul Wallenberg saved the lives of thousands of Jews by providing them with false documents. By a unanimous act of Parliament in 1985, he was made an honorary Canadian citizen for his heroism. The Canadian people followed in his footsteps when we took thousands of Vietnamese boat people into our homes during the 1970s. Canadians were awarded the Nansen Medal by the UN for our generosity in "aiding and abetting" refugees. Are we all smugglers now?

Andrew Brouwer is a member of the Refugee Lawyers' Association of Ontario. Mitchell Goldberg is co-counsel for Janet Hinshaw-Thomas. Janet Dench is executive director of the Canadian Council for Refugees.