Immigration Consequences at Sentencing[1]

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> The severity of deportation—"the equivalent of banishment or exile," [...] only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." [...] To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.
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> *Padilla v. Kentucky*, 130 S. Ct. 1473 – 2010.

The passage above, written by the Supreme Court of the United States, underscores the growing importance of understanding immigration consequences of the criminal process. The Courts in Canada have not been as explicit in finding that a failure to raise immigration consequences at sentencing amounts to incompetence of counsel. However, a growing line of appellate cases varying sentences in such situations make it less and less defensible for counsel to fail to inquire into the immigration consequences for an accused. In *R. v. Martinez-Marte*, 2008 BCCA 136, our Court of Appeal even urged Crown counsel to raise the issue of immigration consequences upon the failure of defence counsel to do so:

> [19] A number of recent cases in this Court have raised this issue. It is to be hoped that in future, the record will demonstrate adequate consideration of the immigration consequences of any sentence to be imposed. It is perhaps not too much to ask the Crown to address these matters before the sentencing judge in the event that defence counsel fails to do so.

The passage above reflects that for many years, it has been accepted that immigration consequences are a relevant consideration at sentencing[2]. A number of appellate courts have dealt with the issue in a long line of cases where a permanent resident was sentenced to two years or more, and the sentence was reduced to two years less a day to preserve the right of appeal under the former legislation.[3] In other cases, the Courts have granted discharges given the unduly harsh consequences of a conviction[4]. Although immigration consequences are a legitimate factor to be taken into account at sentencing, the immigration status of an accused will generally not be a basis for departing from the established range for a given offence[5]. This approach was recently affirmed by the Supreme Court of Canada in *R. v. Pham*, 2013 SCC 15 at paragraph 14:

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[2] *R. v. Melo* (1975), 26 C.C.C. (2d) 510 at 516 (Ont. C.A.).

[3] See, for example, *R. v. Kanthasamy* [2005], 195 C.C.C. (3d) 182 (B.C.C.A.); *R. v Mai* [2005] B.C.C.A. 615; *R. v. Lacroix* [2003] 172 O.A.C. 147; *R. v. Hamilton* (2004) 186 C.C.C. (3d) 129 (Ont.C.A.). It should be underlined that since the passage of the Faster Removal of Foreign Criminals Act on June 19, 2013, the threshold for loss of appeal rights was reduced to six months.

[4] See *R. c. Abouabdellah* (1996), 109 C.C.C. (3d) 477, cited with approval in *R. v. Kanthasamy* [2005], 195 C.C.C. (3d) 182 (B.C.C.A.).

[5] *R. v. Daskalov*, 2011 BCCA 169

> The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

It can also be helpful to raise the issue of immigration consequences with Crown at an early stage, as it is clearly a factor to be taken into account in deciding whether it is in the public interest to proceed with a given set of charges, or under a particular section.

The following sections will explore a number of the immigration issues that arise in the context of criminal sentencing.

The immigration status of an accused

While this may seem somewhat obvious, identifying the immigration status of a client is the most important step a criminal lawyer can take in assessing immigration consequences of criminal processes. In most cases, it is worthwhile to ask the question even if it does not at first blush appear to be an issue. It cannot be assumed that because someone has been in Canada since childhood or does not have an accent that they must be a citizen. In many cases, people will never have made the necessary applications to obtain citizenship or permanent resident status despite having been in Canada for many years. It is always preferable to ask the client, and have them consult an immigration practitioner if they are unclear about their status.

Under the *Immigration and Refugee Protection Act* ("*IRPA*"), there are three types of immigration status: citizen, permanent resident and foreign national.

- A **citizen** is the most secure in their status, and have a constitutional right "to enter, remain in and leave Canada" under s.6(1) of the *Charter*. A citizen can never be found inadmissible as a result of criminal convictions, even for the most serious crimes. The status of citizenship can only be lost if it was originally obtained through fraud or misrepresentation. However, while citizenship will not be jeopardized as a result of criminal proceedings, a citizen's ability to sponsor others to immigrate to Canada may be affected by certain criminal convictions. This issue will be addressed below.

- A **permanent resident** is "a person who has acquired permanent resident status and has not subsequently lost that status"[6]. The status of permanent resident is relatively secure, but can be lost in a defined set of circumstances. The most relevant for present purposes is when a permanent resident is found inadmissible for criminality and a removal order against them comes into force[7]. A permanent resident will only be found inadmissible if convicted of a relatively serious offence, and even then will often have a right to make an appeal to the Immigration and Refugee Board on equitable grounds.

- A **foreign national** is "a person who is not a Canadian citizen or a permanent resident"[8], and has the most precarious immigration status. Foreign nationals require authorization to enter Canada and to engage in certain activities, such as working or studying. There is a wide range of circumstances that could render a foreign national inadmissible to Canada, of which we

[6] IRPA s.2.
[7] IRPA ss.36; 46(c).
[8] IRPA, s.2.

will deal only with criminality. A single criminal conviction, even for a relatively minor offence, could render a foreign national inadmissible and lead to their removal from Canada.

Inadmissibility for Criminality

Section 36 is the most relevant section of *IRPA* for our purposes, and criminal practitioners should become very familiar with the portions dealing with convictions in Canada. The section distinguishes between inadmissibility for "criminality" and for "serious criminality".

Section 36(1) of *IRPA* sets out the grounds of "serious criminality" for which **both** permanent residents and foreign nationals can be found inadmissible:

> 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

The definition of "criminality" is much broader, and applies only to foreign nationals:

> 36 (2) A foreign national is inadmissible on grounds of criminality for
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

It will be helpful to explore the relevant aspects of these sections in more detail.

Convictions under Acts of Parliament

With respect to offences committed in Canada, s.36 requires that there be a conviction. Resolutions not involving conviction including:

- discharge (whether conditional or absolute),
- acquittal,
- stay of proceedings,
- extra-judicial measures,
- peace bonds or orders under s.810 of the *Criminal Code*
- finding of not criminally responsible by reason of mental disorder

In short, with respect to criminal inadmissibility, anything short of a conviction on matters in Canada will have no impact on immigration status in Canada (although the underlying facts found or admitted may have repercussions in certain cases).

One aspect of the definition that is worth underlining is that it refers only to "Acts of Parliament". A conviction under a provincial statute will therefore not render someone inadmissible under *IRPA*. Similarly, contempt of court would also not qualify as a conviction under *IRPA*, even if there were a lengthy term of imprisonment, as the power to cite for contempt does not arise from an Act of Parliament. *IRPA* also specifically excludes contraventions and youth sentences from the inadmissibility provisions:

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

(i) designated as a contravention under the Contraventions Act,

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.[9]

Indictable and hybrid offences

As a result of s.36(3) of IRPA, hybrid offences are deemed to be indictable offences:

36.(3) The following provisions govern subsections (1) and (2):
(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;[...]

The practical consequences of this can be quite serious for both permanent residents and foreign nationals. Any conviction for a hybrid offence will lead to inadmissibility for a foreign national. For permanent residents, even a summary proceeding could lead to loss of permanent residence if the indictable version of the offence carries a maximum penalty of 10 years or more.

While most offences in the *Criminal Code* are either hybrid or indictable, it is worthwhile to see if there is a strictly summary section that fits the facts of the case. For example, the summary offence of obtaining transportation by fraud[10] might fit the facts in a case where someone might otherwise be convicted of the hybrid offence of fraud[11]. A plea to an included summary offence such as simple possession of marijuana in an amount less than 30 grams[12] may also be an option in certain cases.

For a foreign national, convictions for two summary offences arising out of a single occurrence are preferable to a single conviction on a hybrid offence. Two summary offences arising out of separate occurrences will render a foreign national inadmissible.

It should further be noted that under the rehabilitation provisions of *IRPA* a foreign national convicted of two summary offences arising out of separate occurrences will be deemed rehabilitated five years after completion of sentence if there are no further convictions[13]. Those convicted of a hybrid or indictable offence will have to apply for a record suspension, and will have to wait a prescribed period before being eligible to apply. More serious convictions will affect a foreign national's ability to apply for a pardon.

Maximum sentence of 10 years or more

Any offence for which the indictable version carries a maximum penalty of 10 years or more will render either a foreign national or a permanent resident inadmissible upon conviction.

Given the serious immigration consequences for a permanent resident, it may be in their interest not to risk conviction for such an offence if there are options available which avoid the immigration consequences. Crown may be amenable to a plea to one count on an information, to a lesser and included offence, or be willing to lay a new information under a different section of the *Criminal*

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[9] 2001, c. 27, s. 36; 2008, c. 3, s. 3.
[10] *Criminal Code* s.393(3).
[11] *Criminal Code* s.380(1)(b).
[12] *Controlled Drugs and Substances Act*, s.4(5).
[13] *IRPR* s.18.1.

Code or some other statute. For example, the facts underlying a case of uttering forged documents under s.368, which carries a maximum of 10 years can often be encompassed in a plea to fraud under s.380(1)(b), which only has a maximum of 2 years.

Terms of imprisonment

With respect to sentences actually imposed, there are two thresholds for terms of imprisonment that are pertinent. A term of imprisonment of more than 6 months will render a permanent resident inadmissible for serious criminality even if the maximum penalty is less than 10 years.

Any sentence of six months or more will have very serious repercussions for a permanent resident, as they will not only be found inadmissible, but will also lose any right to appeal their removal from Canada to the Immigration Appeal Division[14]. The importance of the right to appeal a removal order is addressed in the next section. Pursuant to *IRPA* s.101(1)(f), a person will also be ineligible to make a refugee claim for serious criminality if convicted for an offence where the maximum penalty is at least ten years.

Pre-sentence custody that is expressly credited towards a person's sentence will count in assessing the length of the sentence under *IRPA*[15]. It may therefore not be helpful for the sentencing judge to credit the full amount of pre-sentence custody on the record if the resulting sentence will be 6 months or more.

Conditional sentences are defined as a sentence of imprisonment in 742.1 of the *Criminal Code* and arguably count as such under *IRPA* as well[16]. Although it goes against many of the assumptions of the criminal bar, it may be preferable for someone to serve under six months of incarceration rather than a longer conditional sentence. In cases where a conditional sentence of longer than six months is being considered, it is worth considering whether sentencing objectives can be met through a longer term of probation and/or more restrictive conditions in addition to a conditional sentence of less than 6 months.

It is important to note that the criteria with respect to length of sentences apply to each individual offence and not to the global sentence. When an accused is convicted on multiple counts, it may therefore be possible to meet the principles of sentencing through consecutive sentences, none of which exceeds the relevant limit. In *R. v. Hennessy* [2007] ONCA 581 the Ontario Court of Appeal varied a sentence for five counts of robbery such that none of the individual sentences exceeded two years, although the total sentence remained 35 months in addition to 7 months credit for pre-sentence custody. Such an approach would also be applicable in avoiding the six month threshold. The Supreme Court of Canada has emphasized that this strategy can be used only if the individual sentences are still within the established range.[17]

Section 44 Report

If a permanent resident is facing the possibility of deportation, they will be given the opportunity to make submissions to the officer before a report is written finding them inadmissible. In particular for permanent residents who do not have a right to appeal the resulting deportation order, this may be their only chance to present their case as to why the order should not be issued. The deadline for

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[14] *IRPA*, s.64.

[15] *MCI v. Atwal* [2004] FC 7, 245 F.T.R. 170.

[16] This issue is currently unclear, and is likely to be litigated early in the implementation of Bill C-43. The comments from the Supreme Court in cases interpreting conditional sentence orders since *Proulx* are not consistent in describing them as terms of imprisonment for all purposes.

[17] *R. v. Pham*, 2013 SCC 15.

submitting material is usually quite short, in this region officers will generally request submissions within 15 days. Although the timelines can generally be extended, it is crucial that individuals who receive such "fairness letters" contact competent immigration counsel immediately. It is generally helpful for immigration counsel to be involved as early as a possible in the process if it becomes evident that inadmissibility is a likely outcome of the criminal proceedings.

Removal Order Appeals

Permanent residents have often been living in Canada for many years, in some cases since childhood. Permanent residents may have very little contact with their country of origin, and their entire families and social networks are often in Canada. The Immigration Appeal Division has the power to stay a removal order on humanitarian and compassionate grounds, which is generally the only recourse which would allow permanent residents caught by s.36(2) to remain in Canada. Loss of the right of appeal through a sentence of six months or more will often result in the deportation from Canada of a permanent resident. The importance of this right of appeal cannot be emphasized enough.

It is helpful to understand a little bit about the process at a removal order appeal before the Immigration Appeal Division. In exercising its equitable jurisdiction to stay removal orders on humanitarian and compassionate grounds, the Board will be guided by the following factors in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4:

- seriousness of the offence or offences leading to the deportation
- possibility of rehabilitation
- length of time spent in Canada and the degree to which the appellant is established;
- family in Canada and the dislocation to that family that deportation of the appellant would cause;
- support available for the appellant not only within the family but also within the community
- degree of hardship that would be caused to the appellant by his return to his country of nationality.

A number of the *Ribic* factors will be familiar to criminal counsel. Of particular relevance in the criminal context is that the Board tends to give a lot of weight to the findings of fact by the criminal court. The client will almost invariably be required to testify at an appeal before the Board. A client whose version of the facts differs from that of the Court will have a difficult time before the Board, as the possibility of rehabilitation without insight into the offence is generally low. It is important to take the time to ensure that the facts set out the by the sentencing judge are as conducive as possible to the client later being able to meet the factors in *Ribic*. Clarification of any factual errors in the decision, even if they will not affect the criminal sentence, can be of great assistance before the Board in establishing the client's credibility.

Very similar to the criminal process, it will be of great assistance to get the client on a path to rehabilitation as early as possible. If an eventual appeal to the IAD appears likely, the client is well advised to have immigration counsel involved as early as possible to assist in developing a plan for rehabilitation and reinforcing other factors of importance to the Board. To the extent that criminal counsel can influence the findings of fact by the Court, consultation with immigration counsel will also be helpful.

Permanent residents who are convicted of offences that will put them at risk of being found inadmissible will be given an opportunity to make submissions to the Minister as to why they should

not be referred to an admissibility hearing and issued a deportation order. In particular for those who will not have a right to appeal to the Immigration Appeal Division, it is crucial that they consult competent counsel as this may be their one and only chance to avoid loss of permanent residence.

Ability to sponsor family members

The one area in which a conviction or jail term may have immigration consequences for citizens is in the ability to sponsor others to come to Canada. In many cases, the ability to sponsor close relatives will be very important to a client, as it may be the only realistic option for a spouse, child or parent to be allowed to join them in Canada. The section is also relevant to permanent residents, who are eligible to sponsor others to come to Canada. Thus, even in cases where it is clear that a permanent resident will not become inadmissible due to criminality, the immigration consequences of a conviction could be serious. It will be helpful to set out the relevant parts of the *Immigration and Refugee Protection Regulations* in detail:

> **133.** (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor [...]
>
> (*d*) is not detained in any penitentiary, jail, reformatory or prison;
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> (*e*) has not been convicted under the *Criminal Code* of
>
> (i) an offence of a sexual nature, or an attempt or a threat to commit such an offence, against any person, or
>
> (ii) an offence that results in bodily harm, as defined in section 2 of the *Criminal Code*, to any of the following persons or an attempt or a threat to commit such an offence against any of the following persons, namely,
>
> (A) a relative of the sponsor, including a dependent child or other family member of the sponsor,
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> (B) a relative of the sponsor's spouse or of the sponsor's common-law partner, including a dependent child or other family member of the sponsor's spouse or of the sponsor's common-law partner, or
>
> (C) the conjugal partner of the sponsor or a relative of that conjugal partner, including a dependent child or other family member of that conjugal partner; [...][18]

Without going through the sections in detail, it is worthwhile to point out the breadth of the section, in particular as it relates to sexual offences. It is therefore important to verify with a client whether they are currently sponsoring someone, or plan to do so in the future. Given the recent changes to the pardon/record suspension legislation, in particular as they relate to offences of a "sexual nature", the consequences of such a conviction could endure for some time.

Applications for citizenship

Criminal sentencing may have a very serious impact on the process of application for citizenship both directly and indirectly. An individual will not be eligible to apply for citizenship if in the three year period immediately preceding the application they have been convicted of an indictable offence. It

[18] SOR/2004-167, s. 45; SOR/2005-61, s. 6.

should be noted that, unlike under *IRPA*, the *Citizenship Act* does not deem summary convictions to be indictable.

Many sentences will also have indirect consequences on residency. In order to qualify for citizenship, a permanent resident must meet the three year residency requirement in a four year period as defined in the Act. However, periods may not be counted towards residency if an individual is:

> (a) under a probation order;
>
> (b) a paroled inmate; or
>
> (c) confined in or been an inmate of any penitentiary, jail, reformatory or prison.[19]

In practice, this can mean that a period of probation or incarceration might be enough to force a client to start the three years of residency again from the beginning after completion of the sentence. Although there does not appear to be any judicial interpretation on this point, there may be an argument to be made that a conditional sentence order would not have an effect on residency for citizenship purposes[20].

Stays of removal

The speed with which criminal matters are resolved could have a significant impact for a client who is or may become subject to an enforceable removal order. Unless the prosecution agrees to stay the matter, an accused person will not be removed from Canada while a criminal matter is pending, as it would contravene s.50(a) of *IRPA*. Section 50(b) also prevents removal while serving a term of imprisonment. In practice, this means that a conditional sentence order may in certain circumstances be in a client's interest as it will prevent removal from Canada. A probation order will not prevent removal[21].

In certain cases, the person is already subject to a removal order and will be removed from Canada upon the conclusion of the criminal proceedings, regardless of the outcome. Early resolution may be a significant disadvantage for the client even if the outcome is otherwise positive from a criminal law perspective.

Interplay between immigration and criminal processes

In many cases, a client will have ongoing immigration matters that are proceeding at the same time as a criminal matter. Some of these situations, such as a pending sponsorship, have been discussed briefly above, but there are a number of ways in which ongoing criminal and immigration processes might impact each other. Criminal practitioners should coordinate with a client's immigration counsel to avoid any unforeseen consequences. In certain cases, it will be of some assistance to consult counsel versed in both criminal and immigration processes. There may be a number of possibilities open to client if an immigration practitioner is brought on at an early stage in the proceedings.

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[19] *Citizenship Act*, s.21.

[20] It should be noted that when read in the context of the relevant sections as a whole, this result is absurd and may therefore invite a more creative interpretation on the part of the Court.

[21] *Cuskic v. MCI*, [2001] 2 F.C. 3 (F.C.A.)