Remedies in Canadian Criminal Law to Inadmissibility Under *IRPA*

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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 in 2010, underscores the growing importance of understanding immigration consequences of the criminal process. The Supreme Court of Canada recently engaged with knowledge of immigration consequences in *R. v. Wong*, 2018 SCC 25, and although not framing the issue in terms of competence of counsel, endorsed the consensus on the obligations of defence counsel to inquire into a person's immigration status and inform them of the consequences of the criminal process:

> [73] The seriousness of these consequences has led Canadian courts to adopt the broader approach and accept that an accused person's awareness of immigration consequences is relevant to the determination of whether his or her plea is sufficiently informed. As a matter of practice, it is also well established in Canada that defence counsel should inquire into a client's immigration status and advise the client of the immigration consequences of a guilty plea, and that counsel should raise the immigration consequences that might result from the client's being convicted or from a particular sentence that might be imposed at a sentencing hearing.

There is no question that the immigration consequences of criminal processes are of great significance to many of the individuals involved in the criminal justice system. This paper will explore some of the impacts of criminal procedures and findings on immigration processes, including remedies in the criminal law when someone has been rendered inadmissible under the *IRPA*. The paper is framed to assist criminal counsel in understanding the potential immigration consequences and implications - it should also be of assistance to immigration counsel when engaging with criminal counsel. It is crucial that criminal and immigration counsel to work together as early in the process as possible to mitigate or plan for the immigration implications of criminal processes.

Counsel must be aware of the possible consequences under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") that may occur as a result of a conviction and sentence. Prior to trial, sentencing, or any plea negotiations, counsel should consider consulting an immigration lawyer in order to appropriately advise their client. The range of immigration consequences that an individual may face will depend on their status in Canada, and it is important to ascertain a client's immigration status early in the process. There are essentially three relevant levels of immigration status in Canada: citizen, permanent resident or protected person and foreign national.

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- A **citizen** has the most stable status, and under our current law the only basis upon which citizenship could be revoked is if it was originally obtained under false pretenses. Note that while a citizen's status will not be placed at risk by criminal processes, there could be other immigration implications in certain situations, such as loss of passport privileges or becoming ineligible to sponsor relatives.
- The status of **permanent resident or protected person** is relatively secure, but can be lost in a defined set of circumstances, including if a permanent resident is found inadmissible for serious criminality, organized criminality, misrepresentation or on security grounds. Permanent residents will generally become eligible to apply for citizenship and criminal processes can also impact their eligibility for citizenship.
- A **foreign national** is any person who is not a Canadian citizen or a permanent resident, and has the most precarious immigration status. Foreign nationals require authorization to enter Canada and to engage in activities such as working or studying. A single criminal conviction for any hybrid offence under an Act of Parliament, even if the offence is prosecuted summarily, will render a foreign national inadmissible for criminality and subject to potential deportation.

Criminal procedures may also have other immigration implications. Someone who is making a refugee claim or has protected person status could face removal from Canada without assessment of their risk of persecution following certain types of convictions. Certain convictions or sentences could affect the ability to sponsor relatives, eligibility to apply for citizenship or access to travel documents. Admissions or findings of fact in criminal matters could also have serious implications in immigration processes. Inadmissibility on security grounds or on grounds of organized criminality, for example, do not require convictions and could be based on admissions made in criminal processes. Findings of fact in a criminal court will also be given significant weight in equitable appeals or other immigration proceedings.

Note that the consequences of a plea or sentence will often be different with respect to the immigration law of other countries such as the United States. If future entry into a foreign jurisdiction is important to a client, then a referral to a competent practitioner of foreign law is appropriate.

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
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> (iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.[2]

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;[...]

[2] 2001, c. 27, s. 36; 2008, c. 3, s. 3.

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.

Most offences in the *Criminal Code* are either hybrid or indictable, but it is worthwhile to see if there is a strictly summary offence that fits the facts of the case. For example, the summary offence of obtaining transportation by fraud[3] might fit the facts in a case where someone might otherwise be convicted of the hybrid offence of fraud[4]. In certain cases of assault or mischief a plea to the offence of causing a disturbance might be appropriate.

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[5]. Those convicted of a hybrid or indictable offence will have to apply for a pardon or record suspension, and will have to wait a prescribed period before being eligible to apply. As will be seen below, 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 for serious criminality 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 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 or foreign national inadmissible for serious criminality even if the maximum penalty for the offence in question is less than 10 years.

In relation to an offence that qualifies as serious criminality, a sentence of **at least six months** will have much more serious repercussions for a permanent resident, as the person will not only be rendered inadmissible, but will also lose any right to appeal their removal from Canada to the Immigration Appeal Division[6]. This means that permanent residents who want to maintain appeal rights need to receive a sentence of six months less a day or lower.

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[3] *Criminal Code* s.393(3).
[4] *Criminal Code* s.380(1)(b).
[5] *IRPR* s.18.1.
[6] *IRPA,* s.64.

Prior to the passage of *PCISA*[7], a person was ineligible to make a refugee claim as a result serious criminality if convicted for an offence where the maximum penalty is at least ten years *and* a term of imprisonment of two years or more was imposed[8]. As of December 15, 2012 the two year threshold has been removed, and anyone inadmissible for serious criminality is ineligible to make a refugee claim[9].

Pre-sentence custody

Pre-sentence custody that is expressly credited towards a person's sentence will count in assessing the length of the sentence under *IRPA*[10]. 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 Sentence Orders

There was some disagreement over the question of whether conditional sentences are a "term of imprisonment" for the purposes of s.36(1)(a) if *IRPA*. The Supreme Court in *Tran v. MPSEP* 2017 SCC 50 recently clarified this issue, finding that a conditional sentence is not a term of imprisonment for the purposes of assessing inadmissibility under s.36(1)(a). The reasoning almost certainly applies to the six month threshold for loss of appeal rights under s.64(2) of *IRPA*. Although the Court has clarified that a CSO is not a term of imprisonment in the context of s.36(1)(a), there remain some scenarios which are arguably not resolved by the Court's findings. Two in particular are worth outlining[11]:

1. Pre-sentence custody followed by CSO: It would seem clear that the Court's reasoning would apply, and the CSO would not be a term of imprisonment. The credit given for pre-sentence custody may, however, count as a term of imprisonment. Until this issue has been resolved in the courts, to maintain appeal rights no more than six months less a day credit could be given, but the length of the subsequent CSO would not matter.

2. Termination/suspension of CSOs: This is one area that might require interpretation from the courts, depending on the position taken by Minister and the Board. There is an arguable case to be made that a CSO that has been terminated is a term of imprisonment for the purposes of s.36(1)(a).

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[7] *Protecting Canada's Immigration System Act*.

[8] *IRPA,* s.101(1)(f).

[9] Note there is an apparent redundancy in the amended version of s.101(2) which may provide the basis for an argument that the ineligibility ought only to apply to convictions in cases where there are actual proceedings by indictment. If the broad criteria for "serious criminality" in 36(1)(a) were meant to apply in s.101(1)(f), then there would be no need for 101(2) at all. If 101(2) is meant to provide some limitation on serious criminality, a reasonable interpretation would be that hybrids would not be deemed indictable for the purposes of 101(1)(f). This would be in keeping with the interpretation by the Courts of Article 1F(b) of the *Refugee Convention*, and the Federal Court of Appeal in *Jayasekara* specifically referred to the mode of prosecution as a factor to be considered in assessing seriousness under Article 1F(b).

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

[11] There is also the related issue of whether a CSO will continue to stay a removal order under s.50(b) post-*Tran*. Section 50(b) stays a removal order "in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;". While on its face, the reasoning in *Tran* would appear to apply, there are strong grounds for taking a different approach to s.50(b) given the punitive nature of CSOs and jurisprudence surrounding s.50 stays. A more detailed discussion is beyond the scope of this paper.

Retrospectivity

The Supreme Court in *Tran* also dealt with another issue related to the interpretation of s.36(1)(a), clarifying that the relevant point in time for assessing the maximum penalty (the 10 year threshold) is the criminal law as it was at the time of the commission of the offence, and not the law in place at the time inadmissibility is being assessed. The contrary approach had been taken by immigration officers and confirmed by the Federal Court of Appeal, creating a challenge for actors in criminal courts in assessing the future impact of criminal convictions. The approach taken by the Supreme Court is much more consistent with s.11(d) of the *Charter* and provides some clarity about the future impact of criminal convictions even if maximum sentences are subsequently amended. It should be noted that in cases where the offence dates straddle an increase in the maximum penalty could create problems in immigration context. It would be helpful in such cases to have the charging document amended to include only the dates prior to the legislative change, or alternatively make it as clear as possible on the record that the Court is imposing sentence on the basis of the sections with the lower maximum penalty.

Individual Offences

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.[12]

Section 44 Report

If a permanent resident is facing the possibility of deportation, they will be given the opportunity to make submissions before a report finding them inadmissible is referred to hearing. 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 initial deadline for submitting material is usually quite short but . 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.

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

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, endorsed by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 84:

- 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;

(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,

(i.1) an indictable offence involving the use of violence and punishable by a maximum term of imprisonment of at least 10 years, or an attempt 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:

(A) a current or former family member of the sponsor,

(B) a relative of the sponsor, as well as a current or former family member of that relative,

(C) a relative of the family member of the sponsor, or a current or former family member of that relative,

(D) a current or former conjugal partner of the sponsor,

(E) a current or former family member of a family member or conjugal partner of the sponsor,

(F) a relative of the conjugal partner of the sponsor, or a current or former family member of that relative,

(G) a child under the current or former care and control of the sponsor, their current or former family member or conjugal partner,

(H) a child under the current or former care and control of a relative of the sponsor or a current or former family member of that relative, or

(I) someone the sponsor is dating or has dated, whether or not they have lived together, or a family member of that person;[13]

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

[13] SOR/2004-167, s. 45; SOR/2005-61, s. 6; SOR/2011-262, s. 1; SOR/2013-246, s. 2; SOR/2014-140, s. 10(E).

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

Various stages of the criminal process can have a serious impact on the process of application for citizenship both directly and indirectly.

While there are pending criminal proceedings under various sections of the *Citizenship Act*, or indictable proceedings under the *Criminal Code* a person is not eligible to be granted or take the oath of citizenship:

> 22 (1) Despite anything in this Act, a person shall not be granted citizenship [...] or take the oath of citizenship [...] (b) while the person is charged with, on trial for, subject to or a party to an appeal relating to [specified offences under the *Citizenship Act*] or an indictable offence under [...] any other Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act;

It should be noted that the *Citizenship Act* does not have a deeming provision like the one in s.36(3)(a) of *IRPA* deeming hybrid offences to be indictable. Once the Crown has elected to proceed summarily the bar in 22(1)(b) will no longer apply to pending matters in non-*Citizenship Act* offences.

A conviction for an indictable offence or certain *Citizenship Act* offences will terminate a pending application and render the person ineligible for a grant of citizenship for four years following the conviction:

> 22(2) Despite anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship [...] or take the oath of citizenship if the person has been convicted of [specified offences under the *Citizenship Act*] or an indictable offence under [...] any other Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act,
> (a) during the four-year period immediately before the date of the person's application; or
> (b) during the period beginning on the date of the person's application and ending on the date on which the person would otherwise be granted citizenship or take the oath of citizenship.

As noted above, unlike under *IRPA*, the *Citizenship Act* does not deem summary convictions to be indictable and the bar will only apply to convictions resulting from proceedings by indictment in non-*Citizenship Act* cases.

The sentence imposed could also have implications for citizenship eligibility, whether the proceedings are summary or by way of indictment. Under s.22(1) a person is not eligible for a grant of citizenship or to take the oath:

> (a) while the person, under any enactment in force in Canada,
> (i) is under a probation order,
> (ii) is a paroled inmate, or
> (iii) is serving a term of imprisonment;

Although there does not appear to be any judicial interpretation on this point, it is likely that the Court would find a conditional sentence order to be a "term of imprisonment" for the purposes of s.21 of the *Citizenship Act*.

The sentences set out above will also have consequences on the residency required to qualify for citizenship in the future as a result of s.21:

> Despite anything in this Act, no period may be counted as a period of physical presence for the purpose of this Act during which a person, under any enactment in force in Canada,
> (a) has been under a probation order;
> (b) has been a paroled inmate; or
> (c) has served a term of imprisonment.

In order to qualify for citizenship, a permanent resident must be physically present in Canada for three years (1095 days) in the five year period preceding their application [see s.5(1)(c)(i)]. 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.

It should be underlined that sections 21 and 22(1)(a) do not require a conviction, and therefore even a probation order issued in the context of a conditional discharge under s.730 of the *Criminal Code* could have the above noted implications.

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, although it is unclear following the decision in Tran whether a conditional sentence order will prevent removal from Canada. A probation order will not prevent removal.[14]

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 perceived as 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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[14] *Cuskic v. MCI*, [2001] 2 F.C. 3 (F.C.A.)

Mechanisms for Relief in the Criminal Law

In some cases, counsel will become aware of the immigration consequences of a criminal process after that process has already been triggered, or in some cases only years after the matter has been concluded and the sentence long since served. It is almost always worthwhile to explore possible remedies, regardless of the stage of the proceedings. The following sections will outline some of the remedies and approaches to explore at various stages.

Guilty Pleas

As the vast majority of cases in the criminal justice system are resolved by way of plea resolution, it is worth addressing the remedies surround guilty pleas in somewhat greater detail. Once entered, a guilty can be withdrawn or struck before the court where it was entered, as long as the application is made prior to the sentence being pronounced at which point the court is arguably *functus* with respect to the validity of the plea and a remedy would have be sought in an appellate court.

The plea will also have to be procedurally valid in law, which is to say that the legal requirements set out in the Criminal Code or elsewhere have been adhered to, and the plea was entered before a court of competent to accept the plea.

Striking of a Plea

A plea that is invalid for failure to comply with legal or procedural requirements ought to simply be struck as a legal nullity unless the Court has jurisdiction to remedy the legal or procedural deficiencies.

An example of striking of a guilty plea on the basis of a procedural irregularity can be found in the unreported case of *Lopez Monzon* (North Vancouver Provincial Court File 62260). Counsel purported to enter a plea of guilty by way of counsel designation to the indictable offence of break and enter into a dwelling house (Criminal Code s.348(1)(d)) when the accused was not present in court. After the plea was entered but prior to sentencing, the accused became aware of the serious immigration consequences and retained new counsel. As a permanent resident, a conviction under s.348(1)(d) would render him inadmissible under s.36(1)(a) of *IRPA* as the maximum penalty is life.

The matter was brought back before the Court as the entering of the plea by way of counsel designation had not be done in conformance with the requirements of the relevant portions of the *Criminal Code*, in particular no order had been made under s.650.01(3):

> 650.01 (1) An accused may appoint counsel to represent the accused for any proceedings under this Act by filing a designation with the court. […]
>
> (3) If a designation is filed, […](c) a plea of guilty may be made, and a sentence may be pronounced, only if the accused is present, unless the court orders otherwise.

The Court struck the plea, and a new plea was entered to a count of forcible entry under s.72(1) which had been laid following resolution discussions with Crown. Section 72(1) carried a maximum penalty of 2 years and therefore did not put the accused at risk of admissibility proceedings under *IRPA*.

Withdrawal of Guilty Plea

There is little disagreement among appellate courts about the fundamental requirements for the validity of a guilty plea. In a passage cited with approval by the Supreme Court in *R. v. Taillefer*,

2003 SCC 70, Doherty J.A. succinctly summarized the basic principles from *R. v. R.T.* (1992), 10 O.R. (3d) 514 (C.A.):

> To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea [...]

Where the validity of plea is brought into question, whether before the court that accepted the plea, or before an appellate court, the accused can apply to withdraw the plea. While a detailed discussion of the validity of pleas is beyond the scope of this paper, some of the grounds upon which the withdrawal of pleas have been allowed include:

- Where an accused had been unduly pressured by a judge[15] or his counsel[16] to enter a plea.
- Where Crown had failed to comply with disclosure obligations prior to the decision to enter a plea of guilty[17]

The Supreme Court has recently provided some clarity as it relates to the requirements for a plea to be informed of collateral consequences, and the test to allow withdrawal of uninformed pleas. Of particular relevance in the present context is the question of whether an accused who was not informed of the immigration consequences of his plea should be allowed to withdraw the plea upon becoming informed of those consequences. The Court set out a two part process for the withdrawal of guilty plea:

> [9] We agree that the accused must first show that he or she was unaware of a legally relevant collateral consequence at the time of pleading guilty, and endorse a broad approach to evaluating the relevance of a collateral consequence in the assessment of whether a guilty plea was sufficiently informed. We also agree that a legally relevant collateral consequence will typically be state-imposed, flow from conviction or sentence, and impact serious interests of the accused. And, like our colleague, we do not see it as necessary to define the full scope of legally relevant collateral consequences nor the characteristics of such consequences for the purposes of this appeal.

The second stage requires setting out the prejudice in an affidavit:

> [19] In our view, an accused seeking to withdraw a guilty plea must demonstrate prejudice by filing an affidavit establishing a reasonable possibility that he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions. This approach strikes what we see as the proper balance between the finality of guilty pleas and fairness to the accused.

Conviction Appeals - Substantive

In some cases, there may be substantive grounds to pursue a conviction appeal, even if it is several years out of time. A detailed outline of the background in *R. v. Reid*, 2017 BCCA 53 is illustrative not

[15] *R. v. Rajaeefard*, 1996 CanLII 404 (ON CA)
[16] *R. v. Laperrière*, [1996] 2 S.C.R. 284.
[17] *R. v. Taillefer*, 2003 SCC 70

only of the relevance of conviction appeals, but also highlights the gravity of the interplay between criminal and immigration processes.

Mr. Reid was born in England in 1962, coming to Canada at age 5 as a permanent resident. He never obtained his Canadian citizenship. He had a history of addiction and mental health issues, and had a history of committing minor offences.

In early 2004 he entered guilty pleas on two separate indictments based on the same underlying facts involving fishing coins from parking meters. On the first indictment, he was charged under s. 351(1) for possession of instrument for the purpose of breaking into a place, an offence carrying a maximum penalty of 10 years. On the second, he was charged under s.352 with possession of an instrument suitable for breaking into a coin-operated device, carrying a maximum two year penalty.

In 2007, the Immigration Division issued a Deportation Order on grounds of serious criminality due to the conviction under s.351. In 2008, Mr. Reid's appeal was declared abandoned by the Immigration Appeal Division after he failed to appear for his hearing. He was homeless and had not been aware of the date of the hearing of his appeal.

It was not until February 2015 that the Canada Border Services Agency was able to obtain a travel document and detained Mr. Reid in advance of his deportation. Applications for deferral and a stay of removal were denied in large part based on representations made about the care he would get upon arrival in the UK. Once removed from Canada, Mr. Reid was left to wander Heathrow Airport for three nights before he tried to end his life by hanging himself in a washroom. He was found by police and taken to a mental health facility and released shortly afterwards. For the next 11 months he remained homeless in the UK, living in a variety of temporary shelters and on the streets of London.

In the interim, an application to re-open the appeal at the Immigration Appeal Division had been granted restoring his permanent resident status but leaving him stranded in the UK pending the appeal being heard. In February 2016, a diligent student intern was able to find one of Mr. Reid's estranged sisters through social media and she flew to the UK to accompany him back to Canada.

In the interim, counsel had obtained the details about the offences underlying the deportation order. The conduct underlying the both convictions was identical, and involved "fishing" for coins in a parking meter. An appeal of the conviction was filed with the British Columbia Court of Appeal along with an application for extension of time despite being over a decade outside the time limits. The Crown ultimately conceded the appeal and the Court entered an acquittal, followed soon after by the Immigration Appeal Division allowing the immigration appeal.

Sentence Appeals

The Courts in Canada have not been as explicit as those in the United States in finding that a failure to raise immigration consequences at sentencing amounts to incompetence of counsel. However, a long 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[18]. 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.[19] In other cases, the Courts have granted discharges given the unduly harsh consequences of a conviction[20]. 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[21]. This approach was recently affirmed by the Supreme Court of Canada in *R. v. Pham*, 2013 SCC 15 at paragraph 14:

> 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.

In some cases, using the general principles of sentencing law can also allow immigration consequences to be avoided on appeal. In *R. v. Zhang*, 2017 BCCA 185 the accused appealed from a 9 month effective sentence for assault and uttering threats imposed in 2009. The accused had been given a two month sentence on each count, with seven months credit granted for time spent in pre-sentence custody. A deportation order was issued under s.36(1)(a) of IRPA because the term of imprisonment imposed was greater than six months. The Court of Appeal allowed the sentence appeal, as the proceedings had been summary and a summary assault conviction is governed by a 6 month prescribed maximum sentence. Consecutive 4½ month effective sentences were substituted on the assault and the uttering threats charges. The deportation order was subsequently quashed on appeal to the Immigration Appeal Division.

Pardons and record suspensions

As noted earlier, s.36(3)(b) specifically excludes convictions for which a pardon or record suspension has been granted:

> (b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

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

[19] 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.

[20] 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.).

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

The *Criminal Records Act ("CRA")* was enacted in 1970 following recommendations in the Ouimet Report[22] for a mechanism to limit or nullify the effects of criminal records and facilitate the rehabilitation and reintegration of offenders. The process involved a rather complex procedure including an investigation and recommendations by the National Parole Board ("Board")[23] to the Solicitor General and resulted in significant delays in the process. In 1992, substantial amendments were made to the *CRA*[24], setting out requirements for the grant of pardon depending on whether the conviction was in relation to an offence that had been prosecuted summarily or by indictment. An applicant was required to be conviction-free for at least three years after completion of sentence to receive a pardon for a summary conviction offence. To be pardoned for an indictable offence required a period of "good conduct" for at least five years after completion of sentence.

In 2010, two high-profile cases brought the pardon process to the forefront of public attention. The first was the granting of a pardon to Graham James, who had been convicted of the sexual abuse of teenage hockey players while he was a coach.[25] The second case, which created more immediate urgency in passing legislation, was the revelation that Karla Homolka would be eligible to apply for a pardon on July 5, 2010 if there were not changes made to the *Criminal Records Act*.[26] The *Limiting Pardons for Serious Crimes Act (LPSCA)* was assented to on June 29, 2010 after Bill C-23A was quickly passed before Parliament's summer recess. In 2012, as part of an omnibus bill to reform various aspects of the criminal law, the Conservative majority government brought forward further amendments to the *CRA* which received royal assent in the form of the *Safe Streets and Communities Act* (*SSCA*) on March 13, 2012.

The *LPSCA* and the *SSCA* both significantly reduced access to pardons (now called "record suspensions") by restricting eligibility, making the criteria for the granting of pardons more onerous and increasing the time before an offender would become eligible after the completion of sentence. Both the *LPSCA* and the *SSCA* purported to apply their respective amendments retrospectively through transitional provisions, meaning that the much more onerous provisions would apply to offences committed and convictions entered prior to the amendments.

The transitional provisions for both the *LPSCA* and the *SSCA* were challenged in *Chu v. Canada (Attorney General)*, 2017 BCSC 630 as a breach of sections 11(i) and (h) of the *Charter* because they had the effect of retrospectively increasing punishment. The Court agreed that the provisions breached s.11, and declared both transitional provisions to be of no force or effect. The decision was followed in an order granted in a similar case in Ontario, and it would appear that neither decision has been appealed by the Minister.

The Board appears to be taking the position that the decisions only apply to residents of Ontario and British Columbia, regardless of the jurisdiction where the underlying offences or convictions took place. The Board will presumably continue to apply the *CRA* amendments retrospectively to residents of other provinces until similar litigation is pursued in those jurisdictions. The following questions and answers currently appear on the Board's website:

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[22] *Report of the Canadian Committee on Corrections*

[23] The name of the "National Parole Board" was changed to the "Parole Board of Canada" in 2013. This paper will simply refer to both as the "Board".

[24] 1992, c. 22, s. 4.

[25] Toronto Star "Hockey coach in sex abuse case pardoned." April 5, 2010. Online: <http://www.thestar.com/news/canada/article/790202>.

[26] CBC News "MPs pass pardon-reform bill." June 17, 2010. Online: <http://www.cbc.ca/news/canada/story/2010/06/17/pardon-bill-passed.html>.

> *I committed my offence(s) in B.C./Ontario but now live in a different province. Am I impacted by these court decisions?*
>
> No, only current B.C. and Ontario residents are impacted by these two court decisions, as the decisions only have jurisdiction in those two provinces. Applicants who currently live outside B.C. and Ontario will continue to be processed under the current Criminal Records Act, regardless of where the offence occurred.
>
> *I live in B.C./Ontario now, but committed my offence(s) in a different province. Am I impacted by these court decisions?*
>
> Yes, individuals currently living in B.C. or in Ontario may be impacted by these court decisions, regardless of where in Canada they committed their offence(s).

It should be noted that although applicants from BC and Ontario are directed to the "self-assessment" tool to determine their eligibility for a pardon, the self-assessment tool appears not to take into consideration the decision in *Chu* and simply applies the current *CRA* eligibility timeframes.

The result of the decision in *Chu* is that there are three relevant time frames for assessing eligibility for a pardon/record suspension and the criteria to be applied.

***CRA* – Offences Committed prior to June 29, 2010**

Summary convictions: the Board "shall" grant a pardon to an applicant who has been conviction-free for at least three years after completion of sentence.

Indictable conviction: the Board "may" grant a pardon to an applicant who has been of "good conduct" for at least five years after completion of sentence.

***LPSCA* – Offences Committed from June 29, 2010 to March 13, 2012**

The *LPSCA* created several categories of offences and made the application process somewhat more onerous for all types of pardons. The eligibility section reads as follows:

> 4 A person is ineligible to apply for a pardon until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:
>
> (a) 10 years, in the case of a serious personal injury offence within the meaning of section 752 of the *Criminal Code*, including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more or an offence referred to in Schedule 1 that was prosecuted by indictment, or five years in the case of any other offence prosecuted by indictment, an offence referred to in Schedule 1 that is punishable on summary conviction […]
>
> (b) three years, in the case of an offence, other than one referred to in paragraph (a), that is punishable on summary conviction […]

The section creates three types of offences:

1 - Non-listed summary conviction offences – 3 years before eligibility

The new legislation made two significant changes affecting summary conviction offences. The first is the identification of a subset of summary conviction offences that are to be treated in the same way as indictable offences. These offences, listed in Schedule 1 of the *Criminal Records Act*, currently appear to be limited to offences with a sexual component. Offences can be added or removed from the Schedule by order of the Governor in Council[27]. The second change is a new requirement that applicants not only be conviction free for three years after completion of sentence, but also be of good conduct during that period. Previously, this condition only applied to indictable offences.

2 - Listed summary offences and non-listed indictable offences

In the case of summary conviction offences listed in Schedule 1 and indictable offences that were not listed in the Schedule, five years had to elapse after the completion of sentence before an applicant was eligible for a pardon. In addition to the requirements that the applicant have been of good conduct during the period preceding the application, the new legislation also added three additional criteria. The applicant bears the onus of demonstrating that the pardon would:

1. provide a measurable benefit to the applicant;
2. sustain his or her rehabilitation in society as a law-abiding citizen; and
3. not bring the administration of justice into disrepute

3 - Listed indictable and serious personal injury offences

The final category of offences includes of two types of offences. The first are offences referred to Schedule 1 which were prosecuted by indictment. The second are serious personal injury offences within the meaning of section 752 of the *Criminal Code*, including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more.

The main difference between this category and the previous category is the length of time before an applicant is eligible to apply for a pardon, which is to say 10 years after completion of sentence. The other criteria are the same as for the previous category.

***SSCA* – Offences Committed After March 13, 2012**

The SSCA simplified the eligibility periods by setting two thresholds – 10 years for indictable offences, and 5 years for summary offences:

> 4. (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:
>
> (a) 10 years, in the case of an offence that is prosecuted by indictment […]; or
>
> (b) five years, in the case of an offence that is punishable on summary conviction […]

The SSCA further restricted access to record suspensions, rendering certain individuals ineligible for a record suspension at all:

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[27] s. 6.3(9).

(2) Subject to subsection (3), a person is ineligible to apply for a record suspension if he or she has been convicted of

> (a) an offence referred to in Schedule 1; or
>
> (b) more than three offences each of which either was prosecuted by indictment […], and for each of which the person was sentenced to imprisonment for two years or more.

(3) A person who has been convicted of an offence referred to in Schedule 1 may apply for a record suspension if the Board is satisfied that

> (a) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;
>
> (b) the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and
>
> (c) the person was less than five years older than the victim.

Definition of Good Conduct

It is clear from existing jurisprudence that good conduct does not simply mean remaining conviction-free, and the legislation itself clearly makes a distinction between a period of good conduct and a period without convictions. The Federal Court has provided a clear indication of the breadth of discretion to be afforded to the Board in assessing good conduct. In *Conille*, the applicant was considered by the police to be the main suspect in a murder case from several years earlier. The Board relied on the fact that the police had an ongoing investigation to decide that the applicant was not of good conduct and to deny the pardon. The Court made the following comments with respect to the assessment of good conduct:

> [14] […] The notion of good conduct, found in section 4 of the Act, is not defined; it is essentially a question of assessment of the facts, a matter clearly within the expertise of the Board. […]
>
> [23] Contrary to the applicant's contention, the notion of good conduct in the context of an application for a pardon under the Act should be envisaged not simply from the standpoint of morale, but rather comprehensively. To interpret otherwise this notion of good conduct in the context of an application for pardon would be simplistic and would not reflect either the Board's duty to be satisfied that the applicant was of good conduct or the effects of a pardon, namely, that the pardon will constitute evidence that the Board was satisfied that the applicant was of good conduct (section 5 of the Act).
>
> [24] In this case, the Board considered that the information from the RCMP was valid and trustworthy and concluded that the applicant was not of good conduct since the police considered him to be the prime suspect in a murder case. I am of the opinion that it was not patently unreasonable for the Board to conclude accordingly.

In *Yussuf v. Canada (AG)*, 2004 FC 907, a similar issue arose with respect to charges that had been stayed after one of the eyewitnesses to an alleged fraud proved to be tainted. The Court discussed the types of evidence that could be considered by the Board in assessing good conduct:

> [15] However in *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (S.C.C.), [1996] 1 S.C.R. 75, Sopinka J. writing for the majority found at para. 29 that:
>
> > ...The language of the *Corrections and Conditional Release Act* confers on the Board a broad inclusionary mandate. Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account "all available information that is relevant to a case".
>
> [16] Relying upon this principle, this Court has found in numerous cases that the NPB is obliged to consider a wide range of relevant, reliable evidence in making its decisions. For example, in *Prasad v. Canada (National Parole Board)* (1991), 5 Admin.L.R. (2d), at pp. 255-6, Rouleau J. concluded that it was open to the NPB to consider, at a detention review hearing, charges for which a conviction was not entered […]

[17] Applying the principle set out above to this case, the NPB was obliged to consider all relevant and reliable evidence related to the applicant's behaviour during the relevant five-year period. This included both charges laid, evidence related to those charges, and the resolution of the proceedings.