

The Verdict

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Immigration Considerations in Canadian **Criminal** Sentencing

Do you represent non-Canadians in criminal matters? How sure are you?

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VANCOUVER BC

Imagine this scenario: you act for a 32-year old woman charged with a criminal offence. With your client's instructions, you agree with Crown to a guilty plea in return for a sentence of exactly two years including credit for pre-trial custody. Your client starts serving her sentence and calls you a few weeks later to tell you that, by the way, she is not a Canadian citizen, having come to Canada 30 years ago from Italy as an infant and never applied for citizenship. She tells you that she has now received a Deportation Order from the Canada Border Services Agency (CBSA), and that she has been advised that she has no right to appeal the Order because of her sentence and will be deported as soon as she is paroled.

The Supreme Court has determined that from a legal and Charter perspective, immigration sanctions are not punishment: *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (SCC). Try telling that to the client in our scenario who has lived in Canada for 30 years and who, upon release, will be summarily deported to the land of her birth with no right of appeal. Deportation from Canada as a result of a Canadian criminal conviction is permanent; once she has been removed from Canada she may never return, even as a visitor, without first requesting and obtaining Authorization to Return to Canada (which is far from a straightforward matter). For a long-term resident of Canada, deportation and permanent separation from

family, friends, career and home may be a much more severe punishment than any criminal sentence.

A significant part of the practice of criminal lawyers involves sentencing, and counsel generally make great efforts to reduce the amount of time their clients will actually spend behind bars. However, with any criminally accused client, it is absolutely essential to determine their status in Canada and assess the effects of different sentences on that status *before* making submissions on sentencing or agreeing to any plea bargain with Crown. Never assume that your client is a Canadian citizen. Some very long-term permanent residents may not even be aware initially that they are not citizens, and I have certainly come across this situation in my practice. Obtain documentary proof of status in Canada, such as a Canadian birth certificate, passport or certificate of citizenship in every case, and add an assessment of immigration status to your file opening checklist.

Criminal inadmissibility to Canada can result from, among other things, convictions in Canada for *Criminal Code* or other federal offences, and can seriously affect the status and rights of both permanent residents of Canada (those who have been admitted to Canada permanently as immigrants but who have not become Canadian citizens) and foreign nationals (neither permanent residents nor citizens – for example, visitors, foreign workers and students). However, the impact is different for these two groups of people.

Criminal inadmissibility is governed primarily by s.36 of the *Immigration and Refugee Protection Act*, which creates two classes of inadmissibility as a result of convictions in Canada. Section 36(1)(a) creates a class of "Serious Criminality" for permanent residents and foreign nationals who are convicted in Canada of offences that are punishable by a maximum term of imprisonment of *at least 10 years*, or of offences for which a term of imprisonment of *more than six months* has been imposed. A key point to note is that the wording "at least 10 years" captures offences that have a maximum sentence of exactly 10 years, which of course includes a great many offences in the *Criminal Code*.


Foreign nationals found inadmissible for Serious Criminality have no right to appeal their Deportation order. The inadmissibility can only be overcome in the future by obtaining a pardon. Permanent residents found inadmissible based on Serious Criminality have a right to appeal their Deportation Order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, unless they have been sentenced in Canada to two years or more, in which case their right of appeal is removed by section 64 of IRPA.

Section 36(2)(a) creates a category of less serious "Criminality" for foreign nationals only (not for permanent residents). This covers foreign nationals who have been convicted of any federal offence (not only *Criminal Code* offences) punishable by way of indictment, including hybrid offences, or of two summary offences not arising out of a single occurrence.

A procedural difference between Serious Criminality and Criminality is that only for the latter do individual CBSA or Citizenship and Immigration Canada (CIC) officers have the authority to grant an exemption from the inadmissibility provisions on humanitarian and compassionate grounds, as per *Operational Bulletin 021 – June 22, 2006: Interim instructions to CIC officers concerning the examination of H&C applications (in Canada)*. In Serious Criminality cases, officers do not have this discretion but must forward cases to the Director of Case Review at National Headquarters in Ottawa, which involves considerable delay and added complexity.

Where the appeal right is preserved, people who are subject to Deportation Orders may appeal based on law, fact and on humanitarian and compassionate grounds. It is this final basis which is crucial for most appellants. The appeal is heard by the IAD which is an administrative tribunal sitting with a single member. The IAD can hear new evidence including witnesses. The rules of evidence are quite flexible, and the onus of proof is the civil standard. In other words, the appeal can be a true life saver for people who have been ordered deported.

The IAD can refuse the appeal, allow the appeal, or issue a stay of removal. The latter has the effect of temporarily suspending removal for

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CRIMINAL INADMISSIBILITY - CONVICTIONS IN CANADA

	Permanent Resident	Foreign National
Single summary conviction or multiple summary convictions arising out of the same incident	Not inadmissible	Not inadmissible
Multiple summary convictions, not arising out of the same incident	Not inadmissible	Inadmissible for criminality, no right of appeal
Indictable or hybrid conviction, actual sentence of less than six months maximum sentence of less than 10 years	Not inadmissible	Inadmissible for criminality, no right of appeal
Indictable or hybrid conviction, actual sentence of six months or more but less than two years, and/or maximum sentence of 10 years or more	Inadmissible for serious criminality, right of appeal	Inadmissible for serious criminality, no right of appeal
Indictable or hybrid conviction, actual sentence of two years or more and/or maximum sentence of 10 years or more	Inadmissible for serious criminality, no right of appeal	Inadmissible for serious criminality, no right of appeal

a specified time and with conditions. If the conditions are met, then the appeal is allowed at the end of the specified time. It is important to note that a common stay condition is to keep the peace and be of good behaviour. *Any* illegal activity, even traffic violations, can and often is found to be a breach of the stay conditions and can result in a cancellation of the stay, the refusal of the appeal and permanent removal from Canada. If you are dealing with a charge of any kind for a permanent resident who is the subject of a stay from the IAD, it is very important to consult immigration counsel immediately to determine the possible implications of a violation of a stay conditions.

OTHER IMPORTANT THINGS TO KNOW – SOME OF THESE MAY SHOCK YOU!

- For the purpose of evaluating criminal inadmissibility, hybrid offences are always treated as indictable, regardless of whether the charges were proceeded with by indictment or summarily.
- Credit for time served prior to conviction is added to the total calculation of sentence duration at the rate that credit is applied by the sentencing court. For example, a sentence of one year plus double credit for 183 days of time served would equal a total sentence of two years plus one day, thereby removing the right of appeal from a permanent resident. In other words, although it may be advantageous from a sentencing standpoint to have a judge give maximum credit for time served, this can have dire immigration consequences. However, the criminal courts have made some effort to soften this. For example, the BC Court of Appeal in *R. v. Kanthasamy*, [2005] BCJ No. 517, BCCA 135 allowed an appeal of a sentence that was equivalent to two years including pre-trial custody, and reduced it by one day in order to avoid the unintended immigration consequence where counsel failed to alert the sentencing judge to the loss of immigration appeal rights. This decision has been followed in several cases including *R. v. Leila*, [2008] BCJ No. 30 and *R. v. QAM*, [2005] BCJ No. 2700, but not in other cases involving much longer sentences for more serious offences.
- Those serving criminal sentences can be removed from Canada as soon as they are eligible for full parole. It is not necessary for the CBSA to wait for the completion of the full sentence for removal. Offenders who are subject to removal orders are not eligible for day parole or unescorted temporary absences. Normally such offenders are transferred directly from the correctional institution to CBSA detention upon eligibility for full parole, pending removal from Canada.
- The loss of appeal right comes only from a single sentence of two years or more, not from multiple consecutive sentences adding up to two years or more.
- Inadmissibility may in some circumstances apply to a foreign national and all of his or her dependents (spouse and children). For a permanent resident, in most cases only the individual is affected by a finding of inadmissibility.

- *Youth Criminal Justice Act* convictions do not result in criminal inadmissibility.
- Dispositions in Canada not resulting in conviction (discharge, stay, diversion) do not give rise to criminal inadmissibility.
- There are also grounds of inadmissibility both for convictions outside of Canada and for having committed offences outside of Canada (even though a charge may not have been laid), for organized criminality and more. For offences and convictions outside of Canada, it is critical to determine whether the foreign offence is equivalent to a Canadian offence. When dealing with related foreign charges, remember to consult immigration counsel with respect to the foreign disposition as well. Equivalency arguments may rest on which charges are proceeded with in the foreign jurisdiction. I will not go into any further detail on this, as the purpose of this article is to deal only with convictions in Canada.

While it may be advantageous from the point of view of time to be served to seek a sentence of two years rather than a slightly shorter sentence in order to qualify for federal time, with its favourable release provisions, this can have disastrous results for permanent residents by removing their right to appeal their Deportation Order on humanitarian and compassionate grounds. Serving a slightly longer period of incarceration in a provincial correctional institution may be in your clients' interests if this results in the preservation of appeal rights, and thereby possibly the ability to remain in Canada.

Be sure to consult counsel experienced in immigration law early on in any criminal proceeding where the accused is not a Canadian citizen.

Addendum: On 1 May 2008, after the writing of this article, the Supreme Court of Canada delivered its decision in *R. v. Mathieu*, 2008 SCC 21. Writing for the court, Fish J. held that pre-sentence custody is not part of a sentence, but is simply a factor to be considered by the sentencing judge in determining the appropriate custodial sentence.

While *Mathieu* was not immigration-related and has not yet been considered by the Federal Court in an immigration context, the decision appears to contradict the previous position of the Federal Court and of the CBSA that pre-trial custody is to be added to the calculation of the duration of a sentence at the rate at which credit is applied by the sentencing judge. The court in *Mathieu* appears to say that the IAD, in considering jurisdiction in Serious Criminality appeal cases, should refer only to the actual period of incarceration imposed by the judge at the time of sentencing. This would have the effect of restoring appeal rights to permanent residents subject to Deportation Orders who receive sentences of less than two years only because of credit for pre-trial custody.

Kyle Hyndman has practiced immigration law with McCrea & Associates in Vancouver since 2000. He is the vice-chair of the Canadian Bar Association's BC Immigration Section and a regular speaker and writer on immigration issues. He is also a team captain and volunteer lawyer for the Western Society to Access Justice and a board member of the People's Law School.

