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Citizenship and Immigration

CITIZENSHIP AND IMMIGRATION SECTION / SECTION DE LA CITOYENNETÉ DE LA IMMIGRATION

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Criminality & *IRPA*

*Leslie H. Morley**

It all seems like a dream now. Can it really be true that as recently as 1995 all convicted permanent residents and Convention refugees, no matter what their sentence, had a right to a full appeal hearing in equity before an independent tribunal which could quash or stay the removal order made against them? Was it really possible then for a landed immigrant, convicted of murder but rehabilitated, to be allowed by the Immigration & Refugee Board to remain in Canada on terms and conditions? In fact it was true then,[1] but it is certainly not true anymore.

In the last ten years the concept of independent adjudication in equity for such cases has been subject to assault from all angles. First the *Immigration Act* was amended to impose a "danger to the public" override that restricted the right of appeal of a removal order to those not so found.[2] By this initiative the hopes for remaining in Canada of most of those permanent residents sentenced to penitentiary[3] time were dashed.

Then, with the advent of the *Immigration & Refugee Protection Act*, the discretion inherent in the danger review process was excised from the law. Thereafter, pursuant to subsection 64(2) of *IRPA*, only those permanent residents sentenced to less than two years in jail have had access to a hearing before the Immigration Appeal Division of the Immigration & Refugee Board. Since 2002 long-term permanent residents, even middle-aged adults living here since young childhood, may be stripped of their status and sent packing, without a right to speak a word to the decision-maker about why they should be allowed to remain in Canada.

In this environment it is important that those without Canadian citizenship understand the limitations of their status in the face of a criminal conviction and that, when an allegation of criminality is made, they take steps from the beginning to assess the immigration implications for them both of a conviction, and of any sentence that might be imposed upon them.

Immigration & Refugee Protection Act

In general, the provisions of the *IRPA* have been interpreted in accordance with the "get tough" approach of that statute. As stated by Chief Justice McLachlin in *Medovarski*:

> The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security.[4]

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As a consequence, the provisions of the *Act* were construed so as to restrict access to the IAD in transitional cases where the sentence imposed was two years or more,[5] or where the violation of the terms of a stay happened before *IRPA* came into force.[6]

IRPA's tougher approach to criminality is not restricted only to the appeal rights of permanent residents. Protected persons too are affected. Now, as before, a refugee claim may be suspended where criminal charges are laid.[7] However, now those claiming protected status are ineligible to do so after a penitentiary sentence has been imposed in Canada or if, outside Canada, a conviction has registered for an offence equivalent to one punishable in Canada by ten years or more in jail.[8] Prior to *IRPA* it was required that there be establishment of inadmissibility, and that a danger review, with the opportunity it presents for written advocacy. A danger finding was necessary to prohibit access to the Refugee Division.[9]

It should also be noted that the immigration consequences of criminality have been extended under *IRPA* even for Canadian citizens and for those permanent residents whose removal from Canada is not being sought. Formerly, sponsors of members of the Family Class could not be under an active or conditional removal order or confined in jail, and their right to sponsor was under suspension while they were before the courts for most offences under federal legislation.[10] To these prohibitions, however, *IRPA* now has added bars to those who have been convicted in Canada or elsewhere of any offence, threat or attempted offence "of a sexual nature" or that caused bodily harm in the domestic context, unless subsequently there has been an acquittal, pardon or the passage of five years. In the case of an offence committed outside of Canada, there must be evidence of rehabilitation. Suspension of processing is now required where the sponsor is charged with an offence punishable by ten years or more in jail.[11]

Pre-sentence Custody

The situation worsened for immigrants and protected persons when pre-sentence custody began to be considered part of the sentence imposed by the criminal court. Now, where a sentence of even less than two years is imposed, access to the IAD will be unavailable where pre-sentence custody is incorporated into the term of imprisonment calculated by the court. Therefore there is no jurisdiction for a removal order appeal where, for instance, the sentencing judge imposed an 18 month term in jail, after explicitly crediting the offender for nine months of pre-sentence custody, even if the nine months was calculated at the rate of two or three months credited per month actually served.

While initially the IAD assumed jurisdiction in such pre-sentence custody situations,[12] with the *Allen, Atwal,* and *Smith* and subsequent cases,[13] the Federal Court went the other way. For instance, in Mr. Atwal's first appearance before the Immigration Appeal Division, his appeal was granted and the deportation order against him was stayed on terms and conditions.[14] He had received a sentence of six months in jail for robbery and 12 months consecutive for use of a firearm, on top of 20 months of pre-sentence custody. On oral review the Minister brought an application to discontinue the appeal because Mr. Atwal's sentence, including the pre-sentence custody, exceeded the two-year threshold. This argument was rejected by the tribunal, and the application to discontinue the appeal was denied.

At the Federal Court, however, Justice Pinard followed the previously ignored *Allen* case, noting the Board had "focussed on a narrow interpretation of 'sentence' and 'term of imprisonment'" and ignored the principles set out by the Supreme Court" in *Wust*,[15] the principles set out by the Federal Court in *Allen* (above), the purposes of the *Immigration & Refugee Protection Act*, the sentencing principles expressed in the *Criminal Code* and the "reality of sentencing",[16] The matter was returned to the IAD, which now found it had no jurisdiction to proceed further.[17] The Federal Court of Appeal has yet to rule on the pre-sentence custody issue.

One might be forgiven for concluding that, if it is the actual time in jail that is important, including pre-sentence custody, then when one is released early on parole for good behaviour, that the sentence has been shortened, in some cases so as to bring it back under the two-year mark. However, the *Cartwright* and *Martin* cases have put an end to that flight of fancy, as the Federal Court determined that it is the sentence imposed that governs, and not the amount of time actually served.[18] As for the question of whether IAD jurisdiction is lost in the case of a conditional sentence, served in the community after pre-sentence custody, there is still no conclusive answer.[19]

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After the Removal Appeal

Even, if one is successful in establishing jurisdiction in the IAD, and in arguing the case before that tribunal, it would be imprudent to be complacent. After a stay of removal has been imposed by the IAD, the Board now, as under the previous legislation, maintains the jurisdiction to review the case. Upon non-compliance with the terms of the stay, the Minister may apply to amend the conditions or dismiss the appeal.

Under *IRPA*, however, the Minister now has new tools to effect removal. Once a stay is imposed, if there is a new conviction with a sentence of six months in jail or more, or where the maximum available sentence is ten years in jail or more, regardless of penalty actually imposed, the stay is cancelled by operation of law and the appeal is terminated.[20] This continues to be the case if the duration of stay is extended by the Board, through and until the removal order is quashed.[21] Further, it is now clear that even comparatively minor offences, including lesser crimes and provincial offences such as speeding and possibly even parking infractions, can put an immigrant in jeopardy, if committed after he or she has been bound by the IAD to keep the peace and be of good behaviour.[22]

While statistics have not been reviewed, it seems that, over the years, there has been a trend to the imposition of a requirement for periodic reviews of stays by the IAD to monitor compliance with conditions, and to consider whether or not an extension of the term of the stay is required.

Avoiding Charges

Given the above, it is clear that the immigration cost of offending is greater than ever before. In the circumstances, what is counsel to do when their client is facing criminal or provincial charges?

First, it is important that your non-citizen clients be advised from the outset that the status you help them to obtain is subject to review in cases of criminality. By extension, all temporary residents should be advised that permanent resident status offers them enhanced protection, as citizenship does for protected persons and permanent residents.

Once charges are contemplated, a dialogue with the criminal lawyer should be established as soon as possible, and it should be drawn to his or her attention that success in criminal proceedings is measured differently in immigration law terms. For instance, to a criminal lawyer, pre-sentence custody can be seen as a two-for-one sale, but the immigration practitioner must be wary of its consequences, as set out above. A quick plea to a minor criminal or provincial offence may be recommended by criminal counsel where the legal fees for a trial seem an unnecessary extravagance, where the accused already has a lengthy criminal record, or where bail is denied but, in immigration terms, that conviction will advance or may even make the case for removal. Likewise, a conviction and finite sentence may seem to be preferable to a "not criminally responsible" finding and indefinite term in custody, but in immigration proceedings a conviction upon guilty plea may constitute a ground for removal, perhaps even summarily.

As the stakes in criminal proceedings may amount effectively to banishment from Canada, creative resolutions should be explored wherever possible, beginning with the development of alternatives to the laying of a charge, and continuing, if it is laid nonetheless, to diversion, participation in victim-offender reconciliation programs, discharges, peace bonds or Family Court restraining orders.

Even where prosecution must proceed, negotiation respecting the classification of the offence to which a plea is made may make a difference. For instance, conviction of a provincial offence, such as trespass to property, is generally preferable to conviction of a criminal offence such as trespass by night,[23] as a provincial offence will not trigger inadmissibility. On the other hand, the straight summary offence of trespass at night is preferable to the electible offence of being unlawfully in a dwelling house as, pursuant to *IRPA*, all offences which may be prosecuted by indictment will be deemed for purposes under the *Act* to be indictable.[24]

Sentence Strategies

It is well established that the risk of deportation can be a factor to be taken into consideration in choosing an appropriate sentence, and tailoring that sentence to best fit the crime and the criminal. On this point, the leading case is still *R. v. Melo*, a decision of the Ontario Court of Appeal, in which Arnup, J.A. stated:

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> The fact that a convicted shoplifter may be in jeopardy under the *Immigration Act* is not, in itself and in isolation, a sufficient ground for the granting of a conditional or absolute discharge. It is one of the factors which is to be taken into consideration by the trial Court, in conjunction with all of the other circumstances of the case.[25]

Also noteworthy is *R. v. Abouabdellah*,[26] in which the Quebec Court of Appeal reduced a sentence of a fine for shoplifting to a conditional discharge, so that a foreign student would not be deported, as that would be a "disproportionate" response to his transgression.

In some cases, for instance where the person concerned is already subject to a stay of deportation, no conviction can be countenanced. In others, such as where the person concerned is a temporary resident, every effort should be made to avoid conviction, although a realistic option of overcoming minor transgressions with a Temporary Resident Permit may exist. In yet other cases, where a conviction registers, a carefully crafted sentence may avoid otherwise devastating immigration consequences.

For instance, while, as indicated above, recognition of pre-sentence as part of a sentence may oust the jurisdiction of the IAD, pre-sentence custody is not likely to be a factor for immigration purposes where there is silence on the record respecting its effect on the calculation of the term of the sentence. For this purpose the "record" would include the warrant of committal, the endorsement on the indictment and the verbal judgment of the court. Note that, if there is an indication within this record that pre-sentence custody has been credited, the impact on sentence calculation of pre-sentence custody may be inferred, even if the manner in which it is credited is not explicitly expressed.[27]

Despite this, however, it is submitted that a credit for pre-sentence custody in a sentence is still discretionary, and should not be inferred absent evidence on the record that it was considered nor, of course, in the face of a statement by the court that credit was considered and rejected. This raises the issue of whether or not it might be possible for pre-sentence custody to be considered by a criminal court as a mitigating factor in imposing sentence, but one either silently or explicitly excluded from the calculation of the length of sentence, so that the impact of the pre-sentence custody in immigration terms is reduced.

As may be evident, avoiding the sentence thresholds in *IRPA* can be important. To a criminal court it may be a matter of little importance whether a sentence is six months or six months less a day, yet from an immigration perspective the former sentence constitutes serious criminality so as to render a permanent resident inadmissible, where the latter, in the absence of other inadmissibility, does not.[28] Further, there is little additional deterrent impact to a two-year sentence, as opposed to a sentence of two years less a day but, as set out above, only the former terminates access to the IAD, assuming no pre-sentence custody has been credited.

Finally, in developing sentencing options with criminal counsel where there are multiple convictions, careful attention should be given to the distinction between consecutive and concurrent sentences. Appeal rights are lost where a permanent resident is sentenced for a single crime that has been punished in Canada by a term of imprisonment of two years or more.[29] Criminal courts often render sentences globally, and the allocation of time between the charges may not always be considered by the court to be a matter of critical significance. Therefore, if a permanent resident is sentenced to three years, it may make little difference to the criminal court if the sentence is calculated as three concurrent sentences of three years, or three consecutive sentences of one year each. In the latter case, however, each of the sentences imposed individually is only one year in jail, less than the two-year cut-off, and access to the IAD is retained despite the penitentiary sentence. In the former case, as for each of the crimes the sentence was three years, each one exceeds the two-year threshold.

After the Sentence is Imposed

Once the criminal process has concluded, it is time to address its immigration consequences directly. If not already done, consideration should be given at this point to whether or not the person concerned may have a claim to Canadian citizenship, for instance, where he or she was born outside of Canada after 1977 to a Canadian citizen. While Canadian citizens cannot be deported, if a claim to citizenship is never asserted, deportation orders have issued.

Still, even if there is no possible citizenship claim, there is some scope for advocacy with the Immigration Officer who is reviewing the allegations of criminality, as under *IRPA* there is a limited authority not to issue a report, or not to refer a report for admissibility

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hearing.[30] While the discretion of the Officer may not be broad, he or she may be persuaded in the case of a long-term permanent resident, for instance, that a warning is an adequate response to low-level or isolated criminality. An argument can certainly be made that submissions on whether or not a report or direction should issue should be received and considered.

Frequently sentence is imposed without any attention to its immigration ramifications. In such circumstances, the Courts of Appeal in three provinces have recognized that it is appropriate to reduce the sentence, even by many months and long after the limitation period for doing so has expired, where the consequences of doing so would do "no disservice to the fitness of the sentence" and the prospect of deportation without a hearing was a "serious but unintended collateral effect of the penalty".[31] While there is some authority going the other way,[32] generally the criminal appeal courts have been accommodating.

If all else fails, a humanitarian and compassionate application pursuant to section 25 of *IRPA* is available to advocate for an exemption of the person concerned "from any applicable criteria or obligation of this Act", including inadmissibility. In such cases a balance must be struck between filing the application early, which is a positive factor when a stay or removal is requested at the end of a sentence, and filing it later, after rehabilitation has been advanced through institutional programming and educational upgrading. For those who are loathe to spend any more than the minimum time in jail, parole for deportation, and the remote prospect of obtaining the Minister's consent to return to Canada in the distant future, may be an attractive option.

For more than a decade the direction of immigration policy and decision-making has been ever more removal-oriented. This trend has been marked by a diminishing scope for discretion and independent decision-making within the removal process and, as a consequence, there is a more limited opportunity for advocacy in the face of criminality. The debasement of permanent resident status, and the value of citizenship, have never been clearer.

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[1] *Stephen Paul O'Connor v. Minister of Citizenship & Immigration* (1992), 21 Imm. L.R. (2d) 64.
[2] *Immigration Act*, R.S.C. 1985, c.I-2, as amended, s. 70(5)(c).
[3] Terms of incarceration of two years or more are served in penitentiaries, *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.743.1(1).
[4] *Medovarski v. M.C.I.; Esteban v. M.C.I.*, [2005] 2 S.C.R. 539, 2005 SCC 51.
[5] Ibid.
[6] *Singh v. M.C.I.* 2005 FCA 417.
[7] *Immigration Act*, s.46.1 and IRPA 100(2)(b)) & (103(1)(b).
[8] *IRPA* (s.101(2)(a) & (b) & 112(3)(b). Ineligibility for referral to the RPD requires a danger finding where the conviction was outside Canada, IRPA, s.101(2)(b).
[9] *Immigration Act*, s.46.01(1)(e)
[10] *Immigration Act*, R.S.C. 1985, c.I-2, as amended, s. 5(2)(c) & (d) and (6).
[11] *IRPA*, s.133(1)(e) & (f); s. 133(2) and (3); and s.136(1)(c).
[12] *M.C.I. v. Markland Davis* (IAD TA1-26990), Néron, March 24, 2003; *Iqbal Singh Atwal v. M.C.I.* (IAD T99-06240), Néron, April 8, 2003; *M.C.I. v. Kungansky Antoine* (IAD MA2-03203), Lavoie, April 9, 2003; *Ronald John Gomes v. M.C.I.* (IAD TA2-21401), Kalvin, August 5, 2003 (reversed on appeal *M.C.I.* v. *Gomes*, 2005 FC 299); *Dwight Anthony Smith v. M.C.I.* (IAD VA2-02916), Clark, April 4, 2003 (reversed on appeal *M.C.I. v. Smith,* 2004 FC 63); *Igor Stepanchikov v. M.C.I.* (IAD TA2-07007), Whist, November 4, 2003; and, as respects a subsection 68(4) application, also in *Timolie Albert Christie v. M.C.I.* (IAD TA0-02536), Collins, October 30, 2003.
[13] *Allen v. Minister of Citizenship and Immigration* (May 5, 2003), IMM-2439-02, Snider J.; .*M.C.I. v. Atwal*, 2003 F.C. 7 (January 8, 2004), IMM-3260-03 (F.C.T.D.), Pinard J; and *M.C.I. v. Smith* 2004 F.C. 63 (January 16, 2004), IMM-2139-03 (F.C.T.D), Campbell J.
[14] *Iqbal Singh Atwal v. M.C.I.* (IAD T99-06240), Néron, April 8, 2003.
[15] *R. v. Wust*, [2000] 1 S.C.R. 455.
[16] *Atwal*, (F.C.T.D.) ¶12-3.
[17] *Iqbal Singh Atwal v. M.C.I.* (IAD T99-06240), D'Ignazio, June 15, 2004.
[18] *Cartwright v. M.C.I,* 2003 FCT 792; and *Martin v. Canada* (M.C.I.), 2005 FC 60.
[19] See David Matas, "Two years or more", *ImmQuest*, II:8 (September, 2006), p.7 for a careful review of the interplay of the conditional sentence and pre-sentence custody.
[20] *IRPA*, s. 68(4).
[21] *Leite v. M.C.I.* 2005 FC 984.
[22] *Huynh v. M.C.I.*, 2003 F.C. 1426; and *Stanhope St. Aubyn Cooper v. M.C.I.* 2005 FC 1253 (FCTD).
[23] *Trespass to Property Act*, R.S.O. 1990, c. T.21, as am.,

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s.2; and *Criminal Code of Canada*, s. 177.
[24] *Criminal Code of Canada*, s. 177 and 349(1); and *IRPA*, s.36(3).
[25] *R. v. Melo* (1975) 26 C.C.C. (2d) 510, at p.516. This case was cited with approval in *R. v. Wisniewski*, 2002 MBCA 93 (CanLII) (M.C.A.); *R. v. Hamilton*, 2004 CanLII 5549 (O.C.A.); and *R. v. Kanthasamy*, 2005 BCCA 135 (CanLII) (B.C.C.A.). Please note, however, that authority in Alberta tends in a different direction, for instance, *R. v. Fung* (1973), 11 C.C.C. (2d) 195 (Alta. C.A.).
[26] *R. v. Abouabdellah* (1996), 109 C.C.C. (3d) 477.
[27] *Jamil v. M.C.I.*, 2005 FC 758.
[28] *IRPA*, s. 36(1) & (2).
[29] *IRPA*, s. 64(2).
[30] *IRPA,* s.44(1) & (2), and for the scope of review see *Henandez v. M.C.I.*, 45 Imm.L.R. (3d) 249; *Cha v. M.C.I*, 2004 F.C. 1507; *Leong v. Solicitor-General*, 2004 F.C. 1126; and *Correia v. M.C.I.*, 2004 FC 782.
[31] *R. v. Lacroix*, 2003 CanLII 36164 (O.C.A); *R. v. Leung*, 2004 ABCA 55 (CanLII); *R. v Hamilton and Mason* (2004) 186 C.C.C. (3d) 129; *R. v Kanthasamy*, 2005 BCCA 135 (CanLII); *R. v. Curry*, 2005 CanLII 32191 (O.C.A.); *R v. Mai*, 2005 BCCA 615 (CanLII) and *R. v. Tigse*, 2006 CanLII 10392 (O.C.A.).
[32] *R. v. To*, 2004 ABCA 197 (CanLII).

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