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Immigration consequences of criminal dispositions and sentencing

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Duty to advise of immigration consequences at plea & sentencing

Advising of immigration consequences when pleading guilty

- Section 606(1.1) of the *Code* requires a court to accept a guilty plea only if "it is satisfied that the accused […] (b)(ii) understands the nature and **consequences** of the plea."
- ***R. v. T.(R.)*** (1992), 10 O.R. (3d) 514 (C.A.): "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 **consequences of his plea**. […] By an understanding of the consequences of his pleas, I mean the realization that convictions would flow from his pleas, **as well as an appreciation of the nature of the potential penalty he faced**."

R. v. Shiwprashad, 2015 ONCA 577

- The Ontario Court of Appeal (ONCA) was directly asked to decide whether counsel had a duty to advise his client of the immigration consequences of entering a guilty plea.
- ONCA strongly suggested that **criminal lawyers have a duty to advise clients on the consequences of a plea and/or ensure they obtain immigration law advice prior to pleading.**

R. v. Shiwprashad, 2015 ONCA 577 (2)

- The ONCA cited the following authorities/sources (paras. 62-64):
- **Padilla v. Kentucky**, 559 U.S. 356 (2010), US Supreme Court held that the failure of counsel to advise noncitizen clients about the immigration consequences of guilty pleas constitutes ineffective assistance of counsel.
- The duty on a defence counsel will vary depending on whether the law is clear or whether the consequences are unclear or uncertain:
  - Where the impact of the law is “not succinct and straightforward”, the lawyer “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences”: (p. 369).
  - However, where the law and deportation consequences are “truly clear”, criminal defence lawyers have a duty to inform clients that deportation will result from a conviction (p. 369).

R. v. Shiwprashad, 2015 ONCA 577 (3)

- **LawPRO** has advised criminal lawyers to identify clients' immigration status before entering plea and/or sentence negotiations in order to avoid exposure to possible claims.
- Mario D. Bellissimo's **Immigration Criminality and Inadmissibility**, looseleaf (2014), (Toronto: Carswell, 2014), advises lawyers to obtain a written direction from a client prior to any guilty plea, and to reference the possible immigration consequences of a plea in that direction (p. 10-46)

R. v. Shiwprashad, 2015 ONCA 577 (4)

- Paul Calarco's "June 2013 Appeal Court Review - R. v. Pham: Immigration Consequences in Sentencing," Criminal Justice Section of the Ontario Bar Association, states it is "essential" for counsel to be aware of the immigration status of any client. The author suggests that counsel " will well be advised to discuss the immigration consequences of matters with a member of the immigration bar and to refer clients accordingly."
- Clewley, McDermott & Young's Sentencing: The Practitioner's Guide, looseleaf (Toronto: Canada Law Book, 2015) suggests that defence counsel "make sure that accused people are aware of the immigration implications before they are arraigned at trial or enter guilty pleas." (para. 1.330)

R. v. Quick, 2016 ONCA 95

- Appeal concerned setting aside a plea to dangerous driving, on the basis that the plea was not informed.
- Appellant's counsel had not advised him that his driver's licence would be suspended indefinitely under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, because he had had two previous drinking and driving convictions.
- "The general question underlying this appeal is whether an accused's unawareness of a collateral consequence can render a guilty plea uninformed" (para. 18)

R. v. Quick, 2016 ONCA 95 (2)

- [27] In T.(R.) Doherty J.A. elaborated on the meaning of "consequences of his plea." On p. 523: "By an understanding of the consequences of his pleas, I mean the realization that convictions would flow from his pleas, as well as an appreciation of the nature of the potential penalty he faced." (emphasis added) In the next paragraph of his reasons , he limited "consequences" to those that are "legally relevant."
- [28] What flows from T.(R.) is that where, as in this case, an appellant raises the validity of a plea for the first time on appeal and claims the plea is uninformed, the appellant must show a failure to appreciate or an unawareness of a potential penalty that is legally relevant. T.(R.) does not define the ambit of penalties that may be legally relevant. But I think legally relevant penalties would at least include penalties imposed by the state. Thus, non-criminal "penalties" imposed by the state for a Criminal Code offence would be "legally relevant."
- [29] And for some accused the collateral or non-criminal consequences of a guilty plea to a criminal offence may have a more significant impact than punishment under the Criminal Code. So, for example, recently this court has suggested that an appellant's failure to understand the immigration consequences of a guilty plea under the Criminal Code may render the plea uninformed: see R. v. Aujla, 2015 ONCA 325; and R. v. Shiwprashad, 2015 ONCA 577, 328 C.C.C. (3d) 191.

R. v. Quick, 2016 ONCA 95 (3)

- [31] This is not to say that an informed plea requires an accused to understand every conceivable collateral consequence of the plea, even a consequence that might be "legally relevant." **Some of these consequences may be too remote; other consequences not anticipated by the accused may not differ significantly from the anticipated consequences; or, the consequence itself may be too insignificant to affect the validity of the plea.**
- […]
- [33] What is called for is a fact-specific inquiry in each case to determine the legal relevance and the significance of the collateral consequence to the accused. **A simple way to measure the significance to an accused of a collateral consequence of pleading guilty is to ask: is there a realistic likelihood that an accused, informed of the collateral consequence of a plea, would not have pleaded guilty and gone to trial?** In short, would the information have mattered to the accused? If the answer is yes, the information is significant. I draw support for this approach from the reasons of Lebel J. in *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70; [2003] 3 S.C.R. 307 and the reasons of Watt J.A. in *R. v. Henry*, 2011 ONCA 289.

Advising of immigration consequences at sentencing

- As a result of the SCC judgment in ***R. v. Pham*, 2013 SCC 15**—an unanimous decision—case law is clear on when and how immigration consequences are relevant at the sentencing stage.
- Immigration consequences are a relevant collateral consequence of sentencing that should be taken in account. However, immigration consequences cannot be used to render an unfit sentence into a fit one.

Pham as applied by the ONCA

- *R. v. Freckleton*, 2016 ONCA 130—Sentence for trafficking reduced on appeal from a seven-month conditional sentence to a six-months-less-a-day
- *R. v. Nassri*, 2015 ONCA 316—Sentence for robbery and possession of a weapon for a dangerous purpose reduced on appeal from nine months' imprisonment to six-months-less-15 days
- See also: *R. v. Pinas*, 2015 ONCA 136.

The need for immigration legal advice for clients accused of a crime

Understanding different status under the Immigration and Refugee Protection Act

- Almost all of immigration law is governed by the Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA) and the Immigration and Refugee Protection Regulations, SOR/2002-227 (IRPR).
- This legislation divides all persons into distinct categories and provides them with certain rights and benefits based on their category.
- It is important to know the category of your client.

Statuses under the IRPA

- Canadian citizen
- Permanent resident
- Protected person (a.k.a. refugee) (can be co-status)
- Foreign national
  - Visitors, temporary workers, students
  - Refugee claimants (person waiting for claim to be heard)
  - Persons with no status (undocumented workers, visitor overstays, unsuccessful refugee claimants)
- Note: a “person registered as an Indian under the Indian Act” always has a right to enter Canada.

Immigration consequences for Canadian citizens (1)

- Not surprisingly, there are almost no collateral immigration consequences for Canadian citizens engaged in the criminal justice system…with one important exception:
  - there are consequences for their ability to sponsor their relatives from overseas for permanent residence in Canada (see next slide).
- Under existing laws, dual-national Canadians convicted of treason, terrorism and national security offences may be subject to citizenship revocation, but those provisions are subject to imminent repeal: Bill C-6.

Immigration consequences for Canadian citizens (2)

- Section 133(1) of the IRPR defines who can be a sponsor for the purposes of family sponsorship and excludes (d) a person detained in any penitentiary, jail, reformatory or prison and (e) a person convicted under the Code (not the CDSA) 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

Immigration consequences for Canadian citizens (3)

- (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;
- UNLESS a record suspension has been imposed or five years or more have elapsed since the completion of the sentence imposed.

Immigration consequences for non-Canadian citizens

- Canada (Minister of Employment and Immigration) v. Chiarelli, [1992] 1 SCR 711: “The most fundamental principle of immigration law is that non citizens do not have an unqualified right to enter or remain in the country.”
- To understand the immigration consequences of criminal dispositions and sentences for non-citizens, it is essential to learn the definition of three terms-of-law under the IRPA:
  - Serious criminality (s.36(1) of IRPA)
  - Criminality (herein: “Criminality simpliciter”) (s.36(2))
  - Organized criminality (s.37)

Serious criminality under IRPA (s.36(1))

- Serious criminality in Canada refers to a permanent resident or a foreign national who has been convicted in Canada of any offence under an Act of Parliament
  - punishable by a maximum term of imprisonment of at least 10 years OR
  - for which a term of imprisonment of more than six months has actually been imposed.

Criminality simpliciter under IRPA (s.36(2))

- Criminality simpliciter in Canada refers to a foreign national (not a permanent resident) who has 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

What dispositions amount to criminality under IRPA? (1)

- The use of the phrases “convicted” and “an offence under an Act of Parliament” is meaningful and narrows the scope of offences described under s.36.
- Criminal charges that result in a disposition short of a conviction – such as discharges, peace bonds, NCR – do not result in criminal inadmissibility under s.36 of the IRPA.
- Convictions for offences under a statute that is not a federal Act of Parliament – such as offences under the Highway Traffic Act, RSO 1990, c H.8 – do not result in criminal inadmissibility under s.36(1)(a) of the IRPA.

What dispositions amount to criminality under IRPA? (2):

- Criminality does not result for an offence:
  - for which a person is found guilty under the Young Offenders Act (s.36(3)(e))
  - for which a person received a youth sentence under the Youth Criminal Justice Act (s.36(3)(e))
  - record suspension has been granted (s.36(3)(b))
  - designated as a contravention under the Contraventions Act (s.36(3)(e))
- All hybrid offences are indictable regardless of how the Crown elects to proceed (IRPA, s.36(3)(a)) – thus only first-time conviction for a pure summary offence will not render a foreign national inadmissible for criminality simpliciter.

Calculating sentences under IRPA (1)

- The IRPA and the Code describe maximum penalties in different terms. This can cause confusion.
- The phrase “a maximum term of imprisonment of at least ten years” in the IRPA includes offences for which a person is “liable to imprisonment for a term of not more than 10 years” under the Code.
- For convictions captured by the first clause of s.36(1)(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”), the actual sentence imposed is irrelevant. Individuals are inadmissible if they are convicted of an offence that has “a maximum term of imprisonment of at least ten years” – even if they received no jail time.

Calculating sentences under IRPA (2)

- Under the IRPA, the calculation of the length of a sentence of imprisonment imposed is assessed prior to any credit (PTC) given for pre-sentence custody. If and how early the offender is paroled are irrelevant.
- As stated by the Federal Court of Appeal in Martin 2005 FCA 347: “[W]e are all of the view that the word ‘punished’ in subsection 64(2) of the Immigration and Refugee Protection Act refers to the sentence imposed, not the actual duration of incarceration.” The same principle applies under s.36(1) of the IRPA. See also: Brown, 2009 FC 660; Atwal, 2004 FC 7.

Calculating sentences under IRPA (3)

- Ask the Judge to be explicit about PTC (to avoid the issue in Jamil, [2005] F.C.J. No. 955). Where a judge is silent on the ratio applied to PTC, it is presumed to be 1:1 time: Brown and Livermore v. MPSEP [2007] I.A.D.D. No. 2411, No. TA2-25093
- Where PTC is already over six months, ask the Judge to explicitly indicate on the record that this “dead time” does not form part of the sentence.
- Where a large global sentence is imposed for multiple convictions, ask the Judge to divide it up into individual consecutive sentences of less than six months.

Calculating sentences under IRPA (4)

- Conditional sentences are treated like custodial sentences under the IRPA.
- A seven-month conditional sentence will render a permanent resident or a foreign national inadmissible for serious criminality: Tran, 2015 FCA 237 (leave sought in the Supreme Court of Canada: 36784, pending).

Organized crime under IRPA (s.37)

- Organized criminality in Canada refers to a permanent resident or a foreign national who:
- is a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity or who is him/herself engaging in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, inside or outside of Canada OR
- in the context of trans-national crime, has engaged in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.
- MORE ESSENTIAL THAN FOR ANY OTHER OFFENSE: Obtain legal advice from an immigration counsel before pleading a non-Canadian citizen to a charge of membership in a criminal organization or a conspiracy-based offence.

Consequences of criminality finding

The chart below shows whether an individual is eligible for a Humanitarian and Compassionate (H&C)/Temporary Resident Permit (TRP)*

	Foreign national	Permanent resident or protected person (non-Canadian citizen)
Crim. *Simpliciter:* Deportable with **no right** of appeal	Yes	No consequences
Serious Crim: Deportable with **no right** of appeal	Yes	Yes
Organized Crim: Deportable with **no right** of appeal	No	No

* H&C/TRP requests are discretionary paper-based pleas to the minister to stay in Canada on humanitarian and compassionate grounds. The request only stops deportation if it is granted. Processing routinely does not place before deportation.

Right of appeal from deportation

- Permanent residents and protected persons have a right to appeal a serious criminality finding to the Immigration Appeal Division (IAD) through what is known as a “removal order appeal.”
  - The IAD may make a decision to temporarily stop their deportation and put them on an “immigration stay” with conditions instead – the equivalent of immigration parole – if humanitarian and compassionate grounds warrant it.
  - At the end of the stay period, based on their compliance with the conditions, the IAD will decide whether to quash the deportation order OR whether to extend the stay OR whether to dismiss the appeal and allow the permanent resident to be deported.
- There is no right of appeal for serious criminality that relates to a conviction for which a sentence of six months or more imprisonment (including a conditional sentence) has been imposed: s.64(2) of IRPA.

Permanent residents on IAD stays

- Why it is critically important to know whether a client is on an IAD stay:
  - Almost all IAD stays require the person not to accrue any further criminal convictions. If a permanent resident is convicted of criminality simpliciter offence, the Minister can request that their IAD stay be cancelled or the IAD can refuse to quash their deportation order when the stay expires.
  - If an individual is granted an IAD stay but is then convicted of another serious criminality offence before it expires, their appeal is immediately terminated by operation of law and they are deportable with no further right of appeal: s.68(4) of IRPA.
  - If a person is found to be inadmissible for organized criminality, their IAD stay is terminated by operation of law with no further right of appeal: s.64(1) of IRPA.

Other consequences of criminality (1)

- Loss of ability to make a refugee claim to the Immigration and Refugee Board (IRB): s.101(f) of IRPA
  - Foreign nationals found inadmissible for serious criminality cannot have their claim for refugee protection heard by the IRB, an independent tribunal with around a 40 per cent acceptance rate. Such persons can instead only make a paper-based application to the minister just before deportation – a process known as a PRRA – which has a less than five per cent acceptance rate. Only applies if the offence carried a maximum sentence of 10+ years.
- Loss of protection from deportation to moratorium countries: s.230 of IRPA
  - Some countries are so dangerous that Canada does not carry out removals even if a foreign national has no immigration status. These include Iraq, Afghanistan, Syria, Libya, Mali, Somalia (Middle Shabelle, Afgoye, and Mogadishu), Gaza, Central African Republic, South Sudan, Nepal, Yemen and Burundi. (List subject to change). This protection does not apply to foreign nationals inadmissible for serious criminality or for criminality simpliciter.

Other consequences of criminality (2)

- Loss of ability to apply for citizenship: s.22 of Citizenship Act
  - Permanent residents cannot apply for citizenship if they have been convicted of an indictable offence in the past four years. A conviction for an indictable offence may also void a pending citizenship application. In this context, unlike under the IRPA, indictable offences include only straight indictable offences and hybrid offences where the Crown elected to proceed by indictment.

Other consequences of criminality (3)

- Loss of ability to sponsor a family member: s.133 of IRPR
  - Under s.133 of the IRPR, a permanent resident cannot sponsor a relative if, during the course of the sponsorship, they are (d) detained in any penitentiary, jail, reformatory or prison or (e) convicted of offence described in s.133(e) of the IRPR UNLESS a record suspension has been imposed or five years or more have elapsed since the completion of the sentence imposed
- As previously noted in the Immigration consequences for Canadian citizens slide:
  - There are almost no collateral immigration consequences for Canadian citizens engaged in the criminal justice system…with one important exception–there are consequences for their ability to sponsor their relatives from overseas for permanent residence in Canada
  - Under existing laws, dual-national Canadians convicted of treason, terrorism and national security offences may be subject to citizenship revocation, but those provisions are subject to imminent repeal: Bill C-6.

Use of police synopsis arising from non-convictions (including acquittals)

- One of the more perverse aspects of immigration proceedings is the standard of proof.
- For inadmissibility, the government needs to prove allegations on the basis of “reasonable grounds to believe” and not a balance of probabilities or beyond a reasonable doubt (IRPA, s.33).
  - As such, evidence that did not result in a conviction—even summaries thereof—are admissible in immigration proceedings to prove “reasonable grounds to believe” that such offences took place.

Use of police synopsis arising from non-convictions (including acquittals)

- This is not the case for serious criminality or criminality simpliciter assessments, where the question is whether a conviction was installed.
- It is relevant for:
  - organized criminality admissibility assessments
  - danger opinions to deport protected persons
  - IAD appeals
  - decisions as to whether to order immigration detention on the basis of danger to the public
  - many other proceedings.
- In such proceedings, police notes and police synopses for bail are routinely entered as “evidence” of the “credible facts” disclosed therein: Tran, 2015 FCA 237 (leave sought in the Supreme Court of Canada: 36784, pending).

Quick tips for criminal lawyers

Quick tips for criminal lawyers (1)

- The best practice is to obtain a sentencing letter from an experienced immigration counsel, setting out the likely consequences.
  - Private bar lawyers generally charge $500-$1000 for such a letter.
- Where immigration consequences cannot be determined, advocate for a disposition short of a conviction where possible.
  - The ONCA has long affirmed that immigration consequences are a relevant consideration in deciding whether to grant a conditional or absolute discharge: R. v. Melo (1975), 26 C.C.C. (2d) 510 (Ont. C.A.).

Quick tips for criminal lawyers (2)

- Amend the facts for any guilty plea in particular to refute any facts in the synopsis to which your client does not agree. Take out all inflammatory language – particularly related to gangs or not related to the particular offence, where possible. Have this clear and specific on the record.
- State on the record what your client believes her/his immigration status to be (including a Canadian citizen) and what (s)he understands the immigration consequences of her/his plea or any submission on sentencing may be.
- Keep a copy of the disclosure and PSRs – or advise the clients to do so. Advise them to get their sentencing transcripts. Obtaining these with immigration deadlines looming at a later point can prove a big challenge.

Any questions?

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