

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

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Dramatic Changes Coming to Criminal Law and Immigration for Permanent Residents

Edward C. Corrigan

On July 24, 2012, Statistics Canada reported the rate of crimes reported to Canadian police forces in 2011 reached its lowest level since 1972. Since 1991, the rate of males charged with violent crime has dropped by 32% and the rate of women charged with violent crime has risen 34%. The severity of crime index, a tool used to measure the extent of serious crime in Canada, also dropped by 6%.¹

The current Conservative government has been criticized for their get tough-on-crime agenda despite the year-after-year evidence that shows crime rates lowering in Canada. As Statistics Canada noted, "Overall, this marked the eighth consecutive decrease in Canada's crime rate," the study said. "Since peaking in 1991, the crime rate has generally been decreasing, and is now at its lowest point since 1972."²

The Conservatives' latest omnibus crime bill passed in the House of Commons in December 2011 would not have affected the most recent Statistics Canada report.

¹ Shannon Brennan, 2012 - "Police-reported crime statistics in Canada, 2011," Juristat, Statistics Canada Catalogue no. 85-002-X. <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.htm>

² *Ibid.*

Full Story on page 2

INSIDE

Focus—Criminal Inadmissibility

- **Dramatic Changes Coming to Criminal Law and Immigration for Permanent Residents 1**
— *Edward C. Corrigan*
- **Case Tracker: Cases You Should Know! . . . 4**
— *Mario D. Bellissimo, C.S.*

Dramatic Changes Coming to Criminal Law and Immigration for Permanent Residents

continued from page 1

While the decrease in crime statistics is welcome there is still work that needs to be done. However, the question remains, is the present Conservative government's "get tough with crime" agenda the right approach given that Canada's crime rate has been decreasing for eight consecutive years.

A criminal conviction has serious negative impact for the convicted. These consequences include making them criminally inadmissible to the United States and to other countries. For a permanent resident, or a person who is not a Canadian citizen, the immigration repercussions can be devastating for themselves and their family.

The law in Canada, as it currently stands, a permanent resident who is convicted and sentenced to 2 years in jail lose their right to remain in Canada and have no right to appeal a deportation order.

If an individual is convicted and sentenced to 6 months in jail, and up to 2-years less a day, they generally become criminally inadmissible to Canada and are subject to a deportation order. These permanent residents, however, do have a right of appeal to the Immigration Refugee Board's Immigration Appeal Division (IAD).

At the IAD the permanent resident gets to present reasons why they should not be deported from Canada, why they do not pose a risk to Canadians and should be allowed to remain in Canada due to family ties and other reasons which the IAD may consider and grant a stay of removal. If the convicted appellant convinces the IAD that they should not be removed at that time a Stay of the Deportation order is issued usually with strong conditions attached. Below is the relevant section of the *Immigration and Refugee Protection Act* (IRPA).

Serious Criminality

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 6 months has been imposed;
- (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
- (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

This is the legal regime that has existed since *The Immigration and Refugee Protection Act* came into force on June 28, 2002. The current law may not be perfect but neither has it been the subject of much criticism.

The fact that many individuals have spouses and children in Canada the IAD considers all of the circumstances of the case, including the risk to the public, rehabilitation and all humanitarian and compassionate consideration before deporting individuals who have been sentenced between 6 months and 2 years less a day.

There are many reasons why an individual who has been sentenced to 6 months in jail should be given a second chance and not deported from Canada. For example an individual may be a refugee and would be subject to torture and even execution if they are returned to their home country.

The current law is proposed to undergo a dramatic change.

The Faster Removal of Foreign Criminals Act

On June 20, 2012, the Honourable Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, introduced Bill C-43 named, *The Faster Removal of Foreign Criminals Act: An Act to amend the Immigration and Refugee Protection Act*. Bill C-43

passed second reading on October 16, 2012 and was referred to Committee for further review. The Committee Report on the bill was presented to Parliament on November 29, 2012. Canada's Parliament adjourned on December 12, 2012 and will resume sitting on Monday, January 28, 2013. It is not clear at this time when Bill C-43 will receive third and final reading. The bill will come into force on a day, or days, to be fixed by order of the Governor in Council.

Minister Kenney states that the Harper government "is putting a stop to foreign criminals relying on endless appeals in order to delay their removal from Canada during which time they continue to terrorize innocent Canadians, . . . Canadians are generous and welcoming people, but they have no tolerance for criminals and fraudsters abusing our generosity."³

The Faster Removal of Foreign Criminals Act reportedly focuses on three areas:

- Make it easier for the Government to remove dangerous foreign criminals from our country;
- Make it harder for those who may pose a risk to Canada to enter the country in the first place; and
- Remove barriers for genuine visitors who want to come to Canada.

Under Bill C-43 the old appeal provisions under IRPA provisions will be applied to individuals who made an appeal before the new legislation is passed into law. Accordingly individuals are grand-fathered and retain their appeal rights. Only individuals reported for serious criminality after Bill C-43 becomes law will be subject to the new law and lose their appeal rights if sentenced to 6 months or more to jail. (See sections 32 and 33 of Bill C-43.)

Individuals who receive a sentence of less than 6 months can still be deported from Canada if they fall under the provision set out in the *Immigration and Refugee Protection Act* (IRPA) where the individual "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 . . ." These individuals will still retain their right of appeal of a deportation order.

This provision of the IRPA is also problematic. The section refers to any conviction "punishable by a maximum term of

imprisonment of at least 10 years." Many sections of the *Criminal Code of Canada* have as a maximum sentence 10 years or more. For example someone who may have directly or indirectly provided a service to a terrorist organization is guilty of an offence of a maximum of 10 years imprisonment. See section 83.02 of the *Criminal Code of Canada*.

Accordingly someone who helped raise money for humanitarian purposes in one of the many areas of conflict in the world could be accused of indirectly assisting an organization that the government of Canada considers a "terrorist organization." This classification of an organization is highly subjective and open to abuse and varies to the whims of the government of the day.

There are many other sections of the *Criminal Code of Canada* where a possible sentence of 10 years or more could be imposed. Even if someone is convicted of one of these offences and does little or no time in prison or is ordered to pay a fine they could be deported from Canada under the provisions of the current law.

Through this proposed legislation the present government is removing all rights of appeal for a conviction of criminal charge that has a sentence of 6 months or more. The objective of this legislation will reportedly reduce the amount of time with criminals sentenced to 6 months in jail will spend in Canada by eliminating all rights to appeal the deportation order. According to the government, this law will reduce the time these individuals remain in Canada by up to 14 months, and reduce their chance of committing more crimes on Canadian soil.

It is, however, reasonable to question these unproven claims. The fact that individuals who have been sentenced to 6 months, or more, to jail lose all rights to appeal the deportation order creates a huge disincentive for all attempts for rehabilitation, co-operation with jail officials, co-operation with probation and parole officers, and also cooperation with citizenship and immigration officials. It also creates a huge disincentive in reporting spousal abuse if the reporting individual knows that their partner could be deported from Canada if convicted.

Under current Canadian law all individuals have a right to a Pre-Removal Risk Assessment (PRRA) before being removed from this country.

By removing hope of staying in Canada if you are sentenced to 6 months in jail will, in my opinion, create unforeseen difficulties. In all likelihood these individuals will be held in detention

³ Citizenship and Immigration Canada, News Release, "Government of Canada Introduces the Faster Removal of Foreign Criminals Act" (20 June 2012) online: <http://www.cic.gc.ca/english/department/media/releases/2012/2012-06-20.asp>

until they can be deported from Canada. This factor will greatly increase the cost of detaining individuals who are now subject to a deportation order with no appeal.

The cost of keeping many individuals in jail pending removal and the added cost for processing the PRRA application has not been factored into the government's equation. There are also other possible complications in the country of removal for example for stateless individuals. In addition it is contrary to Canadian law and International law to return an individual to a country where they may face torture or other cruel and inhuman treatment.

Under current Canadian law there are a variety of ways to overcome inadmissibility to Canada. Depending on the circumstances, an individual may be issued a temporary resident permit. Other approaches include individual or deemed criminal rehabilitation, record suspension (formerly called "pardons" in Canada). There is also an exemption from inadmissibility on humanitarian and compassionate (H&C) grounds from the minister of citizenship and immigration and provision for permanent relief from inadmissibility from the minister of public safety.

This new legislation if it passes, a likely outcome since the Conservatives hold a majority in Parliament, will have to be seriously considered by defense counsel in representing their clients who are permanent residents of Canada for if their clients receive a sentence of 6 months or more they lose their right to remain in Canada. This fact will have serious consequences for spouses and other family members. There will also be consequences for Canada in terms of financial and social costs.

Judges will also have to take into account this issue when sentencing individuals who are not citizens of Canada and are only permanent residents.

Permanent residents should seriously consider applying for and obtaining Canadian citizenship.

Individuals who are permanent residents of Canada may not consider themselves at risk of being deported from Canada. However, as many criminal lawyers and even immigration lawyers will tell you, it is a lot easier than you think to receive a sentence of 6 months. Sometimes it is just being at the wrong place at the wrong time.

According to Andras Schreck, Vice-President of the 1,200-member Ontario Criminal Lawyers Association, the new

proposed law would now be cast broadly enough to include people committed of minor offences, such as possession of marijuana plants. "We are not talking about serial killers, murderers or bank robbers," Schreck said. ("Bill could exile 'thousands' of permanent residents for minor crimes," by Nicholas Kung, *Toronto Star*, October 4, 2012)

It is easy to attack criminals in today's political climate. What is not so easy is to deport an individual who is a permanent resident of Canada, who has spent most of their life here and has strong family ties to Canada including a spouse and Canadian-born children.

The current provisions of IRPA have considerable merit as they balance the risk faced by Canadians against humanitarian and compassionate factors including rehabilitation and the danger the individual poses to Canada in the short and long term. This is a debate that needs to occur before dramatic changes are made to the rights of permanent residents who are sentenced to between 6 months and 2 years less a day and have strong ties to Canada and who pose little or no threat to Canadians.

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Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

Case: *Corneau v Canada (Minister of Citizenship & Immigration)*

Decider: James Russell J.

Court: Federal Court

Citation: 2011 FC 722

Judgment: June 20, 2011

Docket: IMM-6120-10

[19] It is important to recall that the PA received 0 points for arranged employment. The only explanation as to why the PA would not be able to carry out the function of the arranged employment was his IELTS score, yet ironically, the PA received 4 points for English proficiency. There is no indication in either the CAIPS notes or the decision letter as to how the PA's language