Toronto Law Journal

# Immigration Consequences for Permanent Residents Convicted of a Criminal Offence in Canada

**Ali Esnaashari, Barrister & Solicitor**

Criminal lawyers are often unsure about the immigration consequences that could befall their client as a result of a criminal conviction. This article seeks to bring some clarity to the issue, specifically in regards to permanent residents of Canada who have been convicted of a criminal offence under the *Criminal Code*, RSC 1985, c. C-46.

The protection of public safety and ensuring security of Canada is at the heart of the *Immigration Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"). The objectives of IRPA have been outlined under section 3(1) of the Act, and include:

> "(1)(h) to protect public health and safety and to maintain the security of Canadian society;
>
> 3(1)(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;"[1]

In pursuit of these objectives, a permanent resident can be found inadmissible to Canada on the grounds of security (section 34), a human or international rights violation (section 35), serious criminality (section 36) and organized criminality (section 37).[2] If found inadmissible, a permanent resident will be issued a removal order and can subsequently be deported.[3] Almost all criminal convictions in Canada that result in inadmissibility are based on serious criminality (section 35) and organized criminality (section 36). In this article, I outline the circumstances under which a criminal conviction could deem a permanent resident inadmissible to Canada under section 36 of *IRPA* due to serious criminality. Due to the limited scope of this article, the issue of organized criminality will be addressed in a subsequent piece.

***Who is a Permanent Resident?***

There are three types of immigration statuses under the *IRPA*: Canadian citizens, permanent residents and foreign nationals.

A permanent resident ("PR") is an individual who is authorized to reside in Canada on a permanent basis. There are no requirements to renew a permanent resident status and thus, many permanent residents in Canada have lived in the country for decades without applying to

[1] *Immigration and Refugee Protection Act*, SC 2001, c. 27, s.3(1).
[2] *Ibid*, ss.34 – 37.
[3] *Ibid*, s.46(1)

obtain citizenship.[4] Unlike Canadian citizens, permanent residents could lose their status if they fail to comply with the relevant sections of the *IRPA*.[5]

***Serious Criminality:***

According to section 36(1)(a) of the *IRPA*, a permanent resident is inadmissible to Canada due to serious criminality if they are convicted of an offence that is punishable by 10 years of imprisonment, or alternatively for which they have been sentenced to at least six months of imprisonment.[6]

As discussed earlier, a permanent resident could also be found inadmissible to Canada under section 37(1) of *IRPA* due to membership in a group involved in organized criminality, even absent a criminal conviction. Where there is any suggestion or evidence alluding to presence of organized criminality, even if it is not introduced at the criminal trial, this can be relied on to find a permanent resident inadmissible to Canada under section 37(1).

In determining whether a criminal conviction could deem a permanent resident inadmissible to Canada under section 36(1)(a), criminal lawyers must be highly cognizant of the following factors:

- An outcome short of a conviction will not result in the permanent resident's inadmissibility under this section. Therefore, absolute and conditional discharges will not deem an individual inadmissible under this section. Pursuant to section 36(3)*(e)* of *IRPA*, a conviction under the *Young Offenders Act*, R.S.C. 1985, c. Y-1, the *Youth Criminal Justice Act*, S.C. 2002, c.1, or the *Contravention Act*, S.C. 1992. C. 47, also cannot be the basis for a serious criminality finding.[7]
- If there is a conviction, the PR offender will be found inadmissible under this section if the offence is punishable by 10 years of imprisonment, irrespective of the actual term imposed. For example, if convicted of one count of aggravated assault, a permanent resident is inadmissible as this offence carries a maximum potential penalty of 14 years' imprisonment. In determining the applicable maximum term of imprisonment, hybrid offences are deemed to have been prosecuted by indictment, even if the actual offence was prosecuted summarily.[8]
- If the offence does not carry a maximum term of imprisonment of at least 10 years, a PR offender can still be found inadmissible to Canada if they have been sentenced to at least six months of imprisonment following a conviction, irrespective of the nature of the offence. The only relevant factor is whether the term of imprisonment is six months or more. Consequently, the next question is, how is the term of imprisonment calculated and applied in the immigration context?

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[4] Lorne Waldman, *Canadian Immigration & Refugee Law Practice* (Toronto: LexisNexis, 2016) at 333.
[5] *IRPA, supra* note 1 at s.46(1).
[6] *Ibid*, s.36(1)(a).
[7] *Waldman, supra* note 4 at 539.
[8] *IRPA, supra* note 1 at s.36(3)(a)

- Immigration law borrows many terms and concepts from the world of criminal law, but often broadens their scope in application. For example, under the *IRPA*, contrary to the criminal jurisprudence, the term "imprisonment" is broadly construed and may include conditional sentences and pre-trial custody.
- Therefore, in determining whether an individual has been sentenced to at least six months of imprisonment, conditional sentences may be calculated on equal footing with incarceration. This has resulted in the undesirable result that PR offenders may plead for a shorter term of jail rather than serving a longer term in the community, simply to avoid immigration consequences.
- What constitutes a "term of imprisonment" was recently argued before the Supreme Court of Canada in *Tran*, but a decision is yet to be issued. In *Tran*, the Federal Court of Appeal found that it is reasonable for conditional sentences to be treated as a term of imprisonment.[9]

- In addition, the time served in pre-trial custody ("PTC") is deemed to be part of the punishment, and therefore will be included in calculating the six months' imprisonment.[10] For example, if a PR offender has served four months in pre-trial custody and is ultimately sentenced to time-served, if they are provided 1.5:1 credit for PTC, they will be deemed to have been sentenced to 6 months' imprisonment and therefore, will be found inadmissible under section 36(1)(a).
- Notwithstanding serious criminality under section 36(1)(a), an individual can still be found criminally inadmissible to Canada under section 37(1)(a) for being involved in organized crime, even absent a criminal conviction. This topic falls outside the limited scope of this article, and can be addressed in a subsequent piece.

Once a PR offender is convicted and sentenced, the Minister of Public Safety and Emergency Preparedness ("MPSEP") commences the removal process. The Minister or its delegate drafts a report outlining the underlying reasons for the inadmissibility, and this report is referred to an independent tribunal for a final determination.[11] A general understanding of this process is crucial for criminal lawyers advising their clients.

**Admissibility Hearing and Limited Right of Appeal**:

A permanent resident's admissibility to Canada is determined at a hearing held by the Immigration Division branch of the Immigration and Refugee Board. For the purpose of establishing serious criminality under section 36(1)(a), the Board only needs to find that the individual fits one of the categories described above. Therefore, as long as the permanent resident has been convicted of an offence in Canada punishable by at least 10 years imprisonment or they have been sentenced to at least six months of imprisonment, the board

[9] *The Minister of Public Safety and Emergency Preparedness v. Tran*, 2015 FCA 237.
[10] *Waldman, supra* note 4 at 889.
[11] *IRPA, supra* note 1 at s.44.

member has no discretion, and must find the individual inadmissible and issue a removal order.[12]

While the Immigration Division has no jurisdiction to consider equitable remedies, the Immigration Appeal Division ("IAD") has been specifically equipped to consider such factors, which in immigration law are referred to as "humanitarian and compassionate" ("H&C") considerations. While there is no exhaustive list of H&C factors, the individual's establishment in Canada, best interest of any child and exposure to hardship upon deportation are given substantial weight.[13]

The catch is that not all permanent residents will have access to the IAD. Pursuant to section 64(1) of *IRPA*, a permanent resident does not have a right to appeal their inadmissibility to the IAD if they have been sentenced to at least six months imprisonment.[14]

For example, a PR offender who has lived in Canada for an extensive period, has a family, business, assets and who would face hardship in their home country, would want to rely on these factors to avoid deportation. These are factors that can be used to mitigate an inadmissibility finding at the IAD but not at the Immigration Division. Therefore, if the offender is sentenced to six months of imprisonment or more for a single offence, they lose their right to appeal to the IAD and are automatically deemed inadmissible.[15]

This must be a key consideration for criminal lawyers in advising their clients about formulating resolution or sentencing strategy. It is particularly important to avoid imprisonment terms of six months or more, as it would deny the offender the right of appeal to the IAD. If the permanent resident has been convicted of multiple offences, an effective counter measure may be to split the sentences, where the offender serves consecutive sentences each less than six months, rather than a global term that exceeds six months.

**Conclusion:**

In practice, when dealing with a permanent resident accused or offender, criminal lawyers should consider the immigration consequences at the earliest stage. Most significantly, counsel should be cognizant of the maximum possible term of imprisonment for the offence in question, possibility of conviction and a sentence of six months or more imprisonment and availability of a resolution that would avoid negative immigration consequences. It is good practice for counsel to discuss the immigration consequences with their client and confirm their instructions in light of them.

Inadmissibility due to serious criminality under section 36(1)(a), while common, is not the only ground under which a permanent resident could be found inadmissible to Canada. There are other provisions under the *IRPA* that deal with organized criminality, terrorism, human or international rights violations and criminality in other jurisdictions.

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[12] *Waldman, supra* note 4 at 740 – 743.
[13] *Ibid* at 898 – 899.
[14] *Ibid* at 728.
[15] *Ibid* at 728.

Moreover, the applicable rules of admissibility for foreign nationals are significantly different than those of permanent residents. Therefore, criminal lawyers should always advise their non-citizen clients, including permanent residents, to obtain legal advice from an immigration lawyer to clarify the possible immigration consequences.