Criminality & Immigration – A Case Of Double Trouble For The Canadian Immigrant -

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In this treatise, the term "Canadian immigrant" is stretched to include, permanent residents, temporary residents (such as visitors, students and workers), refugees and refugee claimants in Canada.

In Canada, some immigrants perpetrate criminal acts just like some Canadian citizens do. Once a Canadian immigrant yields to criminal impulses and commits a crime, he/she naturally faces prosecution in Canadian criminal courts like his/her Canadian citizen counterpart. However, the Canadian Immigrant suffers more far reaching and disastrous consequences than the Canadian citizen for the same crime.

Usually, once a person completes serving a sentence imposed by a criminal court, the matter is closed. The person is protected against a re-trial or against double punishment or against what legal scholars call double jeopardy. This protection is constitutionally guaranteed. Section 11(*h*) of the *Canadian Charter of Rights and Freedoms* reads as follows:

> **11.** Any person charged with an offence has the right
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> …….. . . .
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> (*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; . . .

Many decided court cases have upheld this position of the law, but its application is jealously restricted to double criminal proceedings and/or double criminal punishments.

However, more often than not, depending on the severity of the crime and/or the severity of the sentence imposed by the criminal court, once a convicted Canadian immigrant completes the criminal sentence, the immigrant would begin a tortuous journey into a complex series of immigration proceedings that invariably result in the loss of his/her immigration status and eventual deportation.

For the Canadian immigrants, this means that being caught by the criminal process is double trouble in respect of which they have no protection. The only barrier, which is not even absolute, spelt out by the Supreme Court of Canada in the case of **Suresh v. Canada (Minister of Immigration and Citizenship)**, [2002] 1 S.C.R. 3, is that an immigrant may be spared deportation if he/she faces torture in the country to which he/she will be removed.

Unfortunately, many Canadian immigrants caught up in the criminal process and their criminal lawyers are unaware of what lurks around for them in the immigration context until their criminal cases are completed, and are later confronted by Immigration officers seeking their deportation.

Constitutional challenges by Immigration lawyers on the basis of an argument that it is double jeopardy for immigrants who have completed their criminal sentence to face deportation have been rejected routinely by the Canadian Courts from very early on. In **Hurd v. Canada (Minister of Employment and Immigration)**, [1989] 2 F.C. 594, the Federal Court of Appeal held that the deportation of a permanent resident with a serious criminal record did not violate paragraph 11(*h*) of the Charter, which proscribes double punishment for the same offence, for the reason that deportation is not a punishment. In **Hoang v. Canada (Minister of Employment & Immigration)**, (1990), 13 Imm. L.R. (2d) 35 (F.C.A.), a matter that involved a Convention refugee, the Federal Court of Appeal held (at page 41) that "deportation for serious offences affects neither s. 7 nor s. 12 rights, since it is not to be conceptualized as either a deprivation of liberty or a punishment." In **R. *v.* Shubley**, [1990] 1 S.C.R. 3, the Supreme Court of Canada held that an offence falls under s. 11(*h*) of the *Charter* if the proceedings are, by their very nature, criminal proceedings, or if the punishment invoked involves the imposition of true penal consequences.

Therefore this double trouble scenario for the Canadian immigrant is settled law, and is here to stay.

Under various sections of the Canadian Immigration and Refugee Protection Act (IRPA) and the regulations, Immigration officers are empowered to make reports alleging that an immigrant is inadmissible – that is he/she is liable for removal from Canada - irrespective of the fact that the immigrant has completed his/her criminal punishment. As a matter of fact, IRPA and the criminal law process are so intertwined that many of the inadmissibility

provisions (and even refugee protection ineligibility provisions – see IRPA, ss.100 and 101) of IRPA are triggered by the criminal processes.

See for example, section 36 of IRPA, which states:

> Serious criminality
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> **36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
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> (*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 six months has been imposed;
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> (*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
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> (*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.
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> Criminality
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> (2) A foreign national is inadmissible on grounds of criminality for
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> (a) having 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;
>
> (b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
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> (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 indictable offence under an Act of Parliament; or
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> (d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.
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> .....

Once an Immigration officer is of the opinion that an immigrant is caught by any of the criminality-related inadmissibility provisions of IRPA, the officer usually prepares a report containing the allegations. The report is then forwarded to the Immigration Division of the Immigration and Refugee Board for the conduct of admissibility hearings. At the admissibility hearings, the panel members are usually constrained by the strict provisions of IRPA to make removal orders (deportation and exclusion orders) against the immigrant. In another treatise, I will proffer strategies and tactics for dealing with criminality-related inadmissibility reports and admissibility hearings.

Aside from the resultant removal orders that the convicted immigrant faces, other immigration processes, such as application for stay of deportation before the Federal Court, are negatively impacted by acts of criminality committed by the immigrant. Federal Court judges often resolve issues of balance of convenience and/other issues of equity against an applicant with a baggage of criminal history.

In the case of **Barrington Richards v. The Minister of Citizenship and Immigration; the Minister of Public Safety and Emergency Preparedness**, 2007 FC 783, Justice Shore of the Federal Court, in rejecting an application for stay of deportation, provided the following instructive analysis:

> [35] The balance of convenience further tips in favour of the Minister when the Applicant's criminal record is taken into account. The Applicant, in this case, has accumulated 33 convictions while in Canada, including multiple convictions for assault and assault with a weapon. According to the IAD, which recently heard his appeal, he is an unrehabilitated long time criminal with little establishment demonstrated in Canada. As Justice Marshall Rothstein stated in *Mahadeo*, criminal convictions are "public interest considerations that weigh heavily against an applicant in a consideration of the balance of convenience." Justice William P. McKeown agreed with this reasoning in *Gomes v. Canada (M.C.I.)*, (1995), 26 Imm. L.R. (2d) 308 (T.D.), and held that:
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> > [7] With respect to the balance of convenience test, I am in agreement with the reasoning of Rothstein J. in *Mahadeo v. Canada (Secretary of State)*, October 31, 1994, (unreported), Court File IMM-4647-94 (F.C.T.D) [Please see [1994] F.C.J. No. 1624]. In that case, Rothstein J. stated that when the applicant is guilty of welfare fraud or has been convicted of a criminal offence in Canada, the balance of convenience weighs heavily in favour of the respondent. In this case the applicant was convicted of assault causing bodily harm, which I find to outweigh any consideration of the emotional devastation of the applicant's family. I therefore find that the balance of convenience in this case lies with the respondent.

Another potential negative impact of the criminal process on the immigrant is in the area of detention and bail. Oftentimes, many persons are arrested by police for sundry alleged acts of criminality but are not criminally charged due to, say, want of evidence. In the case of many immigrants, especially those without permanent resident status, they are not allowed to go home like their Canadian citizen counterparts. Instead, the police nonetheless hand them over to Immigration authorities. The immigrants often end up in immigration detention pending when they get released on stringent bail conditions or, worse, get deported.

A further disadvantage suffered by Canadian immigrants, especially those without permanent resident status, is that they are often put on "immigration hold"/detention once they face criminal charges or otherwise become engaged by the criminal process. This means that the immigrant is usually confronted with two simultaneous detention orders and has to go through double bail proceedings - one bail proceeding before the criminal court judge and another bail proceeding before the Immigration Division judge. Thus, the immigrant caught by the criminal process usually has to fulfill double bail conditions before he/she gets bail unlike his Canadian citizen counterpart.

REMEDIES

In the light of the analysis above, it is clear that the best solution for the Canadian immigrant with a criminal propensity is for him/her to resist the urge to commit crime and/or try hard to avoid involvement with the criminal process.

Another buffer is for the immigrant to take speedy steps to acquire Canadian citizenship once he/she is qualified. Acquisition of citizenship by an immigrant ensures that he/she would be treated like other Canadian citizens – and not subject to immigration proceedings and eventual deportation - should he/she thereafter run afoul of the law. Usually, an immigrant is eligible to file for Canadian citizenship 3 years after acquiring permanent resident status. Many immigrants who face criminality related deportation could have avoided such predicament had they filed for citizenship as soon as they became eligible.

As a further remedy, an immigrant who is caught by the criminal process should seek legal advice/opinion from an Immigration Lawyer regarding the

likely impact of the criminal process on his/her immigration status while the criminal case is still pending. The legal opinion should be submitted to the criminal court judge either orally or in writing before sentencing. I have rendered many such legal opinions in the past. The legal opinions sensitize criminal court judges to the reality of the immigrant's apparent double trouble predicament, and often work for the benefit of the immigrant.

Finally, I recommend that an immigrant who has served his/her criminal sentence should apply for pardon and/or apply to be deemed rehabilitated. This application should be done by the immigrant as expeditiously as possible once he/she becomes eligible. A pardon and/or a finding that the immigrant has been rehabilitated provides immunity against the inadmissibility provisions of Immigration and Refugee Protection Act.