

# Arrest and Detention

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Gordon Maynard  
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## Introduction

C-11 “The Balanced Refugee Reform Act” and Bill C-31 “Protecting Canada’s Immigration System Act” made significant changes to the Refugee Protection program. Included in the legislation were changes to detention and related enforcement provisions extending to all foreign nationals and permanent residents in Canada. The changes expanded grounds for arrest, mandated detention for designated persons, reduced opportunities for release, reduced avoidance of removal orders and expedited removals.

The C-31 amendment to IRPA s.48(2) is a telling example. Prior to C-31 enforceable removal orders were to be enforced “...as soon as reasonably practicable.” Post C-31 enforceable removal orders “...must be enforced as soon as possible”. The message is that Parliament does not intend for delays in removals; the priorities are clarified. It is message no doubt intended to influence judicial decisions in stay applications.

This paper focuses upon the Arrest and Detention provisions of IRPA, with emphasis on recent changes to the law. There is also search and seizure discussion, more than there needs to be. Search and seizure is a related topic. An unreasonable personal search is a Charter detention. (R v Simmons (1988) 45 C.C.C. (3rd) 296. (SCC)).

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## I. Authority to Arrest and/or Detain

- **Permanent residents and foreign nationals**
- **Inland and POE**

The IRPA authorities for arrest and detention are found at Part 6 of IRPA, s.55(1) – s.55(4), setting out who can be arrested, on what grounds and when warrants are required.

C-31 has amended these provisions by increasing the opportunities for arrest or detention of permanent residents (s.55(1), s.55(3)), and creating mandatory arrest and detention obligations for designated foreign nationals (s.55(3.1)).

# Arrest and Detention

## 1. Who can be Arrested and/or Detained?

Under IRPA, permanent residents and foreign nationals can be arrested and/or detained.

## 2. Warrants or No Warrants?

### Foreign Nationals – (A55(1), A55(2))

No warrant is necessary for the arrest and detention of “ordinary” foreign nationals (foreign nationals who are not protected persons).

A warrant can be issued in all cases, and must be issued in the case of foreign nationals who are protected persons.

### Permanent Residents - (A55 (1))

A warrant is always necessary for the arrest and detention of a Permanent Resident

### At Port of Entry - (A55 (3))

No warrant is required for detention (not “arrest and detention”) of permanent residents and foreign nationals at Port of Entry, on certain grounds.

## 3. Grounds for Arrest and Detention

### Foreign Nationals (A55 (1), (2) (3))

Reasonable grounds to believe that foreign national

- Is inadmissible, and
  - Is a danger to the public, or
  - is unlikely to appear for examination, admissibility hearing, removal from Canada or at a proceeding that lead to a Ministers A44 (2) order, or
- if the officer is not satisfied of the identity of the foreign national, in the course of any proceeding under the Act (does not apply to protected persons).

### Designated Foreign Nationals (A55(3.1))

Foreign nationals designated under s.20.1 of IRPA for being part of an irregular arrival, and 16 years of age or older, must be detained on entry or be arrested and detained after

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entry, with or without warrant. There is no discretion. This is a new provision through C-31.

### Permanent Residents (A55(1),(2))

Reasonable grounds to believe that the permanent resident

- Is inadmissible, and

Is a danger to the public, or  
is unlikely to appear for examination, admissibility hearing, or removal from Canada or or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2).

(The inclusion of the s.44(2) proceedings ground is new, through C-31)

### At Port of Entry (A55(3))

If officer

- Considers it necessary for the examination to be completed, or
- Has reasonable grounds to suspect the PR or FN is inadmissible for security, human/international rights grounds, criminality, serious criminality or organized criminality.

## 4. What's New? and Comments....Authority to Arrest and/or Detain

What's new is

- Expanding the grounds for detention of permanent residents to include suspected inadmissibility for criminality, serious criminality and organized criminality (at POE)
- Expanding the grounds for arrest and detention of permanent residents to include risk of non-appearance at “a proceeding that could lead to the making of a removal order ...under s.44(2)”.
- Creating mandatory detention or arrest and detention authority for designated foreign nationals.

Comments

- What is the consequence of authorizing detention of permanent residents at POE on the basis of suspected inadmissibilities, including criminality, serious criminality and organized criminality?
  - A permanent resident has a right of entry (A19(2))
  - A permanent resident is not compelled to answer questions regarding suspected inadmissibility at POE examination (ENF 4 -11.4, A16)
  - What would an ID member decide in a detention review of a PR at POE? (note the changes to s.58(1)c, discussed below)

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- There is only one circumstance under which an administrative removal order (issued by an officer, not in an ID hearing) can be issued against a permanent resident – on the basis of a determination in Canada of residency breach. A permanent resident would have appeal from that decision. Under what circumstances does it make sense to arrest a permanent resident to be in attendance for s.44(2) issuance of the appealable departure order?

### II. Detention Reviews

IRPA and the regulations create three schemes for detention review, depending on which of three authorities is relied upon for the detention:

- i. Permanent residents and foreign nationals detained under A55(1), A55(2) or A55(3),
- ii. Designated foreign nationals (per A20.1) detained under A50(3.1), or
- iii. Persons named in a S.77 Certificate detain under a Minister's Warrant (A81)

I am not going to discuss Certificate detention reviews except to note that the legislation was amended after the fourth (?) Charkaoui case to provide for 48 hour and six month detention reviews. This is relevant to discussion about the review scheme for mandatory detention of designated foreign nationals, introduced by C-31.

C-31 has also brought significant amendments to the “regular” detention review provisions, most likely a consequence of the experience of CBSA in dealing with the Ocean Lady and Sun Sea arrivals in 2009 and 2010. Those detainees would be “designated foreign nationals” as a result of “irregular arrival” if they landed today.

These changes deserve a good look.

#### 1. The “regular” review scheme for A55(1),(2) or (3) detentions.

The regular scheme involves two fairly immediate reviews upon detention, by an officer and by the Immigration Division; and then scheduled Immigration Division reviews thereafter.

The statutory authorities are:

A56 - Release by an officer

A57(1) – Review by the ID within 48 hours of detention or without delay afterward.

A57(2) – Review by the ID within 7 days thereafter, and then at least once every 30 days following.

Grounds for Release –

By an officer (A56)

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- If the officer is of the opinion that the grounds for detention no longer exist then they can order release, with conditions that the officer considers necessary.
- (ie if the officer is of the opinion that the A55(1),(2),(3) grounds are no longer an issue, there is no suspicion of inadmissibility or no danger to public, flight risk or identity concern.)

By the IAD (A58, R )

- The ID shall release the person, unless it is satisfied that
  - they are a danger to the public, or
  - they are unlikely to appear (at an examination etc.) or
  - the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality, or organized criminality (A58(1)c), or
  - the Minister is of the opinion that identity has not been established (but may be) and the person has not cooperated or the Minister is making reasonable efforts to establish identity
- The ID may order detention if they are satisfied there is danger to the public or flight risk, and may order conditions (A58(3)).
- The ID must take into account prescribed factors, when determining the grounds for release – flight risk, identity, danger to the public (A58(1)). The prescribed factors are set out in R.245, R246 and R247. They are fairly predictable and non-contentious factors in my view. I wonder why Parliament thought it necessary to set them out.

### **What's New? and Comments – “Regular” Detention Review Scheme**

What's new is the C-31 amendment to A58(1)c to include investigation of criminal inadmissibility (ordinary, serious or organized) as a ground of continued detention of either permanent residents or foreign nationals. The significance this amendment can't be appreciated without knowledge of the Ocean Lady and Sun Sea detention review experiences.

The Ocean Lady and Sun Sea were the vessels that landed on the BC coast in 2009 and 2010 respectively. The vessels carried Sri Lankans seeking refuge in Canada. There were 76 persons on the first vessel, 492 on the second. The voyages spawned a furious government response with condemnation of human smuggling and dire warnings of the threat of further vessels on the horizon unless changes to the refugee system and enforcement law were implemented. Elements of the subsequent amending legislation including C-11 and C-31 were in direct consequence of the experiences in dealing with detention, examination and processing of these arrivals.

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There is no question that the processing of these arrivals stressed the resources of the government and the public. The personnel of CBSA, armed forces, police, private bar, NGOs, provincial corrections authorities, the Legal Services Society of B.C., the IRB tribunals, public health authorities, volunteers and others are all to be commended for their efforts to deal with a very difficult situation. But it must also be understood there were deliberate political decisions to encourage firm, hard-line application of the law to pursue continued detention in the interest of discouraging further similar arrivals. The C-31 amendment of A58(1)c and the new detention mechanisms for “designated foreign nationals” were a direct result of the Sun Sea and Ocean Lady experiences in seeking to maintain detentions of these individuals

CBSA arguments for the most lengthy continued detentions were focused upon the grounds of needing to establish identity (now A58(1)d) or the need to investigate suspected security inadmissibility, due to membership in the LTTE (now A58(1)c).

Each of these provisions had been in place since IPRA was implemented, but had not been used to any significant degree. With the vessel passengers, these provisions proved to be very effective and powerful tools for maintaining detention.

26 of the 76 Ocean Lady passengers were maintained in the longest detentions on the grounds of continuing investigation of suspicion of LTTE membership. The Minister only had to demonstrate that they were taking “reasonable steps” to investigate a reasonable suspicion of inadmissibility to maintain detention. It was irrelevant whether detention would be maintained once inadmissibility was established; the continuing investigation was all that need be shown.

The 26 Ocean Lady detainees were eventually released, substantially when the Minister abandoned argument for continued detention because it was getting to the point where there would have to be disclosure of confidential information to justify the continued investigations. The last of the Ocean Lady detainees were released after about 3 month detention.

Detention for identity investigation (now A58(1)d) was also effective, both in the Ocean Lady and Sun Sea proceedings. The Minister needed to only put forward an opinion that identity was not established, coupled with an assertion that the person was not being cooperative, or the Minister was making reasonable efforts.

Detentions of the Sun Sea detainees were lengthier. With few exceptions many spent six months or more in custody. Part of that was due to number of detainees involved and the stresses placed on investigations and processes. There was also the practice of revolving detentions for the same detainees. For those initially released there developed a practice of commencing judicial review and obtaining stay orders of ID releases. The continued detentions spawned other detention reviews, other releases and other JR and stay orders. The cycle of releases and detentions for the same individuals contributed to the 100s of Federal Court proceedings that arose from Sun Sea detentions.

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There were two significant consequences from these detention experiences; the creation of the “designated foreign national” procedures for detention and review of detention, and a dark respect amongst involved counsel for the effectiveness of ‘investigative’ grounds for continued detention. Those counsel involved with the Sun Sea and Ocean Lady detentions are very concerned with the C-31 expansion of the investigative detention provisions to include suspected criminality, serious criminality and organized criminality inadmissibilities.

Not too many permanent residents or foreign nationals are going to be suspected of human/international rights violations, but a good number could be suspected of criminal inadmissibility are going to be vulnerable to detention at port of entry. Advance passenger lists and information sharing with overseas police organizations coupled with the authority to detain at POE and to maintain inland detention during investigation is a going to prove to be a formidable weapon, much to the detriment of the liberty of many.

### 2. The Designated Foreign National review scheme for A55(3.1) detentions.

C-31 introduces the “designated foreign national” and their particular scheme for detention and review of detention.

Designated foreign nationals (DFNs) are persons who the Minister designates on the basis of their manner of “irregular arrival”. The criteria are set out in s.20.1:

- The person must be part of a “group” arrival. The number is not defined. Presume it is two or more...
- The Minister must either –
  - be of the opinion that examination and investigations of the persons, particularly as to identity or inadmissibilities cannot be done in a timely manner, or
  - have reasonable grounds to suspect that there has been or is organized entry for profit or in relation to organized crime or a terrorist group.

The detention consequences for DNFs are significant:

A55(3.1) Mandatory Detention –If the DFN is 16 years or older, they must be detained on their entry, or arrested and detained in Canada, with or without warrant.

A56(2) Term of Detention – The DFN is detained until:

- final determination of their claim for refugee protection or protection,
- ID release under A58 review, or
- Minister release under A 58.1

A57.1(1) Initial Detention Review – The ID will initially review the detention within **14 days** of detention or without delay thereafter.

A57.1(2) Further Review – The ID will subsequently review the detention **every six months thereafter.**

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A58(1.1) Continued Detention – The ID must continue the detention if any of the following exist, and the ID cannot consider any other factors:

- Danger to the Public (A58(1)a)
- Flight risk (A58(1)b)
- Investigative detention (A58(1)c)
- Minister if of the opinion identity not established, regardless of cooperation of individual or efforts of the Minister to establish identity (A58(1)c)

### What's New? and Comments

By definition, irregular arrivals are not going to have identity or admissibility issues dealt with in a timely manner, so it is quite unlikely that releases are going to be effected at the 14 day ID review. The result is that DNFs are going to remain in custody until their refugee claims are determined or there is a successful 6 month review, unless the Minister intervenes and grants discretionary relief under A58.1. The Minister may do so if there are exceptional grounds, or if the reasons for detention no longer exist.

Detention is being used to deter organized arrivals for entry to access refugee claims in Canada. These provisions would obviously be applied to events similar to the Sun Sea or Ocean Lady arrivals, but also to smaller group arrivals, theoretically as small as groups of two.

The use of long term detention to deter refugee claims is unprecedented. The use of long term detention was previously limited to cases of person named in Ministerial certificates for security, organized crime or human/international rights violations, circumstances where protection of public/international safety was paramount.

The effectiveness of the DFN provisions has already been demonstrated.

On December 15 2012 the Canada Gazette published the MPSEP designation of five groups of persons as irregular arrivals. Each of the groups had entered Canada at different times between February and October 2012.

One group consisted of 27 persons, the number of persons in other groups is not known to me. Twelve persons from the group were detained. All had refugee claims initiated. The detentions were effective, as were denials of at one application for Ministerial release. Most of the detained claimants withdrew their claims before the end of January and were removed from Canada.

### III What is “Detention”?

#### 1. Immigration Detention and Charter Detentions

# Arrest and Detention

The IRPA legislation does not define “detention”. The legislation does, however, distinguish between authority for “arrest and detention” and authority for “detention” which is something that occurs at the POE on entry.

In the Criminal Law world there are many cases and court consideration of “detention” for the purpose of Charter rights including the right not to be arbitrarily detained (s.9), the right to instruct counsel and be notified of that right upon “arrest or detention” (s.10b) and the right to be informed of the reasons therefor, on arrest or detention (s.10a).

In the Immigration context there are certainly detentions that are Charter detentions. When there is an express arrest and detention under A58, or a A58(3) detention at POE for further examination or investigation for suspected inadmissibility, Charter detention rights are triggered. What is less clear is whether Charter detentions occur in the course other Immigration or POE procedures that involve delay and at least a psychological perception of loss of liberty.

Leading Supreme Court of Canada cases on Charter detentions generally and in the Immigration context include:

*R. v Therens*, [1985] 1 S.C.R. 613 – roadside detentions  
*R. v. Simmons*, [1988] 2 S.C.R. 495 – “detention”, customs context  
*Jacoy v. R.* [1988] 2 S.C.R. 548 – “detention”, customs context  
*Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 – “detention” POE secondary examination  
*Charkaoui v. Canada (Minister of Employment and Immigration)*, [2007] 1 S.C.R. 350 – arbitrary, cruel and unusual punishment (s.12), differential treatment of citizens and non-citizens (s.15).

## 2. Charter “detentions”.

- “Detention” (for the purpose of the Charter) has been defined as "a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee" (Therens)
- Detention is not arbitrary where there are standards that are rationally related to the purpose of the power of detention.
  - i.e. The issuance of a security certificate relating to danger posed by an individual , or consideration of flight risk as a trigger to detention are standards that are rationally related to the detention authority.
- While deportation does not engage s.7 interests, detention for deportation does. The principles of natural justice require a fair hearing for review of detention. The elements of a fair hearing for detention review includes
  - An independent and impartial magistrate
  - A right to know the case

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- A right to answer the case
- Detention without warrant does not offend s.9. In a security context, the signing of the certificate provides the rational foundation for detention. (Presumably in other contexts it is the requirement that there be the requirement of reasonable grounds to believe that there is inadmissibility combined with a danger or flight risk element).
- Failure to provide a timely review of detention is a breach of s.9 guarantee against arbitrary detention, which includes s.10(c) protection.
- Indefinite detention, without hope of release or recourse to a legal process to procure release may constitute cruel and unusual punishment. S.7 and s.12 requires that there be a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Considerations include:
  - Reasons for the detention
  - Length of detention
  - Reasons for delay in removal
  - Anticipated future length of detention
  - Availability of alternatives.
- Differential treatment of citizens and non-citizens is not offensive to s.15 equality protection. S.6 of the Charter already distinguishes between citizens and non-citizens with respect to right to remain in Canada.

### 3. Immigration “detentions” and the Charter

Here is a short list of judicial determinations of immigration “detentions” for Charter purposes:

- i. Questioning of a POE claimant at POE in secondary examination, with a wait of four hours, on matters of entry and claim for protection did not constitute a detention. (Dehghani)
- ii. POE detention for the purposes of a customs strip search is a detention triggering s.10 right to counsel. When the customs officer informed the individual that she was going to be searched, she could not have refused and continued on her way. The *Customs Act* made it an offence to not cooperate with the search. The customs officer had assumed control over her movements by a demand which had significant legal consequences. That constituted s.10 detention. (Simmons).
- iii. The questioning and holding of “boat person” by immigration authorities and the RCMP for approximately three days was close supervision and control over the individual’s movement. She was offered the opportunity to consult counsel only at the end of that time, after four interviews and the issuance to her of an exclusion order.

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The individual was “detained” for the purpose of s.10. The “start” of detention was not stated but it was before issuance of the removal order. (Huang<sup>1</sup>)

- iv. An inland foreign national overstay was arrested by the RCMP for causing a disturbance, and was handed over to CBSA. He was held for three days before being brought to enquiry for detention review. During that time he was interviewed by an officer and by the Minister’s delegate who issued a removal order. When the FN asked for counsel, he was told duty counsel was not available, and was told he could consult another lawyer. He didn’t know any other lawyers. The FN was detained for purposes of s.10 from the time of his initial request. (Chevez<sup>2</sup>)
- v. An inland stowaway was handed over to the RCMP by a local church member. The RCMP arranged for CIC interview that same day. The stowaway was then placed into an immigration detention facility. He was interview again two days later, by another CIC officer, and a removal order issued. Three days later he had his detention review. There was s.10 detention when the stowaway was placed in an immigration detention facility, on the day of his first interview. (Dragosian<sup>3</sup>)
- vi) A refugee claimant is detained at POE. He is interviewed that day by an officer, and again two days later, while still in detention. Interview notes are later used at his refugee claim. The Court held that there was detention that started after his initial interview. His second interview was clearly given while in detention. He was under restraint in circumstances where he could reasonably have benefited from the assistance of a lawyer, but was prevented from obtaining that assistance: *Therens*, These circumstances amounted to detention and a violation of s.10(b). (Chen<sup>4</sup>)
- vi) A foreign national is stopped by police and is arrested as a wanted fugitive from PRC. At the police station he is interviewed by an Immigration officer. A police constable sits in as interpreter, and is not understood by the FN to be any other than interpreter. After the Immigration officer leaves, the FN and constable have a conversation. The constable’s notes of the conversation are later used in the refugee claim proceedings. During the conversation the FN asks to consult counsel, but is told that counsel are “thieves” and unnecessary. During the conversation the FN makes statements that are contradictory to his later refugee claim narrative.

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<sup>1</sup> Huang v. Canada (Minister of Citizenship and Immigration) (T.D.) [2002] 3 F.C. 266

<sup>2</sup> Chevez v. Canada (Minister of Citizenship and Immigration), 2007 FC 709, [2008] 1 F.C.R. 354

<sup>3</sup> Dragosin v. Canada (Minister of Citizenship and Immigration), 2003 FCT 81

<sup>4</sup> Chen v. Canada (Minister of Citizenship and Immigration), 2006 FC 910

5. Liang, Re, 2002 CarswellNat 4719, (2003) Imm.L.R. (3d) 251 (CRDD)

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The Refugee Division held that the FN was clearly detained, and s.10 Charter right to counsel had been breached. (Liang<sup>5</sup>)

### 4. What's New? and Comments

There is nothing new regarding the meaning of detentions. The case of Dehghani continues to be leading law on detentions in the POE Charter context. POE primary and secondary examinations, even lengthy ones, are not “detentions” for the purpose the Charter.

There is a Charter detention at the POE if

- the individual is detained for “further examination” or investigation of suspected inadmissibility, per A55(3)
- The individual is detained as an designated foreign national
- The individual is reported and detained for hearing or removal (A55(1),(2))
- The individual is subjected to an intrusive search
- The individual is detained for criminal charges/investigation.

Any inland arrest and detention is a Charter detention.

## IV Search and Seizure / Detention

IRPA has several provisions providing for authority to search persons and seize goods. IRPA provisions generally set out the authority for search and seizure, while the Regulations deal with procedural issues related to the search or seizure.

There are very few search or seizure provisions directly related to arrest and detention:

By common law, a peace officer may carry out a search of the person incidental to arrest. Reasonable and probable grounds are not a prerequisite for the search, its purpose is to remove weapons, evidence or instruments of harm. CIC and CBSA have this authority as well.

### **A16(3) – On arrest, detention or removal order**

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Permanent residents or foreign nationals subject to arrest, detention or removal order may be required to provide any evidence, photographic, fingerprint or otherwise, that may be used to establish identity or compliance with the Act.

## 1. Other authorities for Search and Seizure

The other IRPA or Customs Act authorities deal with search or seizure of persons or goods at POE, under warrant, to prevent fraud or other misuses, or on the making of applications.

Related issues include Charter protections against unreasonable search and seizure (s.8), legal rights upon detention (s.10) and common law rights of search. The Charter issues are relevant because an unreasonable personal search is a Charter “detention” giving rise to s. 9 and s.10 rights.

### At the Port of Entry

#### A15(3) ENF12. 9.1 Vehicles bringing persons into Canada

CBSA officers have the authority to board and inspect any means of transportation bringing persons into Canada, including the examination of

- Any persons carried by the means of transportation
- Any documents or records pertaining to the person, and to seize the documents or records for copying.

#### A139, s.98, 99 Customs Act ENF 12 – 7.1,7.7, 7.13 Searches of Persons and Good.

At the Port of Entry, officers are authorized by IRPA s.139 and Customs Act s.98, s99 to search any person seeking to enter Canada, without warrant, and to search goods.

The IRPA s.139 authority extends to searches of the person, their luggage and personal effects, and their means of transportation.

The officer must have reasonable grounds to believe that the person:

- (a) Has not revealed their identity, or has hidden on or about their person documents that are relevant to their inadmissibility, or
- (b) Has committed or possesses documents that may be used in the of commission of person trafficking (A117, 118), or possessing a passport or visa for contravening the Act (A122)

The Customs Act s.98 extends to search of any person who has arrived in, or is about to leave, Canada.

The officer must suspect on reasonable grounds that the person has secreted on or about his person anything

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- In respect of which the Act contravened,
- Goods which are prohibited, controlled or regulated for import or export,
- That would afford evidence with respect to a contravention of the Customs Act

The Customs Act s. 99 provides the corresponding authority for officers to search goods.

### Inside Canada, or Anywhere

#### **A16(1)(2) – On application – Obligation to provide Relevant Evidence**

Persons making applications are obliged to provide relevant evidence and documents required by the officer. For foreign nationals, this includes photographic and fingerprint evidence, and a medical examination.

#### **A140, ENF12 9.4-10.1 – Seizure of transportation, documents and other things**

A140 authorizes seizure of transportation, documents and other things. Both CIC and CBSA officers can seize ‘documents and other things’ but only CBSA officers can seize a means of transportation.

Officers must believe on reasonable grounds that the document or other thing,

- Was fraudulently or improperly obtained or used, or
- The seizure is necessary to prevent its fraudulent or improper use, or
- To carry out the purposes of this Act.

“Document or other thing” may include fraudulent passports and other status documents, genuine passports and visas used improperly, airline tickets, vehicles or mail (see ENF12 10.1 – 10.11), for example.

The disposition of seized objects can include return, return with security, sale or destruction per r.253-r.257. Pursuant to r.258, there is no A140 seizure where six years have passed since fraudulent or improper use or obtaining.

#### **A 138, ENF12 8-8.12 Search with Warrants**

Pursuant to A 238 CBSA officers enforcing the IRPA have the powers of police officer under s.487 to 492.2 of the Criminal Code, including the ability to apply for and obtain search warrants.

Search warrants might be obtained for the purpose of

- Obtaining telephone or credit records to locate a person wanted on an Immigration warrant.
- To obtain documents establishing a person’s identity.
- To obtain evidence relating to an admissibility hearing.
- To obtain documents necessary for effecting removal.

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There is no IRPA authority to conduct warrantless property searches outside of the Port of Entry.

### 2. s. 8 Charter Breaches

Search or Seizure

s.8 Everyone has the right to be secure against unreasonable search or seizure.

The Courts have considered the reasonableness of inland searches in the following cases

Harkat, Re, 2009 FC 659, 82 Imm.L.R. (3d) 24 – authorized search of residence, to ensure compliance

Canada v Jabbalah 2009 FC 33, 78 Imm.L.R. (3d) 125 – authorized seizure of mail, to ensure compliance

Masuki v Canada 2005 FC 101 – reasonableness of a warrant search

and the Courts have considered POE Charter issues re search and seizure and detention in these cases,

R v Jordan (1984).11C.C.C. (3rd) 565. (BCCA).

R v Simmons 1988 CanLII 12 (SCC), (1988) 45 C.C.C. (3rd) 296. (SCC).

Dehghani v Canada (Minister of Employment and Immigration). 1993 CanLII 128 (SCC), [1993] 1 S.C.R. 1053. (SCC).

R v Jacques 1996 CanLII 174 (SCC), (1996) 110 C.C.C (3rd) 1. (SCC).

R v Monney. 1999 CanLII 678 (SCC), (1999) 133 C.C.C. (3rd) 129 (SCC).

R v Smith (2004)26 C.R. (6th) 375, (Ont SCJ).

R v Hudson 2005 CanLII 47233 (ON CA), (2005) 203 C.C.C. (3rd) 305. (OntCA).

R v Corbyn (2005) Carswell Ont 8299. (OntSCJ).

R v Jones (2006) 211 C.C.C. (3rd) 4. (OntCA).

R v Sekhon (2009) 67 C.R. (6th) 257. (BCCA).

R v Sahota (2009) Carswell Ont 4989. (OntSCJ).

In the immigration context, the cases have informed us that...

1. Port of Entry searches or seizures are not subject the “normal” s.8 Charter Protections

The degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny.

Travelers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are

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accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.

(Simmons, *supra*)

2. Port of Entry Customs Act searches are reasonable if;
  - a. The searching officer has reasonable cause to suppose that the person searched has goods subject to entry at the customs, or prohibited goods, secreted about his or her person, and
  - b. before any person can be searched, the person may require the officer to take him or her before a police magistrate or justice of the peace or before the collector or chief officer at the port or place who shall, if he or she sees no reasonable cause for search, discharge the person.

(The onus is on the person to ask for the second opinion on reasonableness of the search request. There is no mandatory obligation on officers to inform the person of their right to obtain a second opinion).

(Simmons, *supra*)

### 3. POE Search or Seizure – Practical Issues

ENF 12 contains much good advice to officers conducting IRPA POE searches of the person. An unauthorized personal search at the POE is a detention triggering s.9, s.10 rights. The manual reminds officer to be mindful of the limits of their authorities, the grounds for searches and the need to respect the Charter protects. There are practical guidance tips, including:

“Reasonable grounds” to conduct a search does not include searching a foreign national and his luggage for evidence of intention to work illegally, merely on suspicion.

(ENF 12 -7.2)

An officer conducting an involuntary personal search is “detaining” that person and is required to read to them a statement giving the grounds for detention and advising them of their right to contact duty counsel, and to give them the opportunity to exercise that right.

(ENF 12 – 7.4)

Any delay in authorizing entry to a Canadian, permanent resident or Indian, including a personal search conducted for immigration purposes constitutes detention and the person would have to be advised of their right to counsel.

(ENF 12 – 7.7)

If a person objects to a frisk search it is necessary for the officer to inform the person of their detention, the grounds for detention and provide their Charter rights arising from detention.

## Arrest and Detention

(ENF 12 – 7.13)

### VI. Compellability (and Detention?)

I am not quite sure what the CBA CLE Planners had in mind when including compellability in a discussion of detention/search or seizure provisions. I have imagined a link between compelled examinations (A15, A16) and the Charter concept of detention.

Is it possible that the multitude of obligations and penalties surrounding examination of a person who makes an application engages the Charter protections on detention?

Imagine a PR who has made a sponsorship application for their mother being invited by a CBSA officer to attend the office for a s.15/s.16 compelled examination. The sponsor attends and the officer wants to question the sponsor on matters including the possibility of misrepresentation as to income, the sponsor's recent conviction for assault of another family member, the sponsor's residency history and fact of his recent divorce from his recently sponsored spouse.

The sponsor is obliged to answer the questions for the purpose of the examination. (A16)  
If the sponsor refuses to answer the examination he faces the possibility of a s.128 offence with possible penalty of five years in jail and fine of \$50,000.00.

If he answers the questions he faces the same offence, by admitting misrepresentation.

If he gets up and leaves he is facing the likelihood of a warrant being issued per A55(1) and his arrest to compel his attendance at a further examination.

Is these circumstances is the PR not “detained” for Charter purposes?

Is this not a “*a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee...*” and is the officer not an agent of the state who has assumed “*control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.*” (Therens)

Should the officer conducting the examination be required to inform the PR of his detention and the Charter rights arising?

What if the PR is detained, and his answers to questions are compelled? (See R v. Ellis (2009) 82 Imm. L. R. (3d) 142 – It is one of the cases annotated in Goslett and Caruso, under s.15.)

Finis