Understanding Criminal (In)Admissibility
Navigating the Points of Intersection Between Immigration & Criminal Law

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With the passage of the *Immigration and Refugee Protection Act* (IRPA)[1] the impact of criminality in immigration cases intensified and almost eight years later we are still learning to what extent.[2] This paper will discuss points of intersection between criminal and immigration law principles and serve as a practical reference point for dealing with issues arising in this context.

This treatment highlights the severe consequences that may potentially result from a conviction generally but in particular offences under the IRPA and the Minister's increasing determination to prosecute such offences.

A: UNDERSTANDING (IN)ADMISSIBILITY

To understand why, as a matter of practice, immigration lawyers may know a little more about criminal law than their criminal lawyer counterparts know about immigration law, we need look no further than the IRPA itself. The objectives of the Act evidence a balancing of interests that include, on the one hand, permitting Canada to pursue the maximum social, cultural and economic benefits of immigration to enrich and strengthen the social and cultural fabric of Canadian society, and on the other, protecting the health and safety of Canadians and maintaining the security of Canadian society whilst promoting international justice and security by fostering respect for human rights and - most importantly

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[1] S.C. 2001, c.27

[2] **Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell Refer to Chapter 9 Emerging Trends which outlines the legislative objectives of the IRPA as it relates to security rather than inclusion and integration.**

for present purposes - by denying access to Canadian territory to persons who are criminals or security risks.[3]

It is also worth noting that the IRPA not only denies criminally inadmissible individuals entry Canada, but also authorizes the removal from Canada of foreign nationals and Canadian permanent residents who are deemed inadmissible.

We can now appreciate that the immigration lawyer's exposure to criminal law is related to one of the main challenges in serving our clients, namely, understanding when a client is criminally inadmissible.

Assessing (In)Admissibility

After meeting with clients whose admissibility is questionable, immigration lawyers first look at the following:

1. Were they convicted of an offence in Canada?
2. Were they convicted of an offence outside of Canada that is considered an offence in Canada?[4]
3. Did they commit an act outside of Canada that is both punishable under Canadian law and is considered a crime under the laws of the country in which it occurred?[5]

Next, a lawyer must ask whether the charges were withdrawn, dismissed, discharged or pardoned. If a client's offence occurred in Canada and their charges have been withdrawn, dismissed, discharged (absolute or conditional), or pardoned under the *Criminal Records Act*, they are not considered criminally inadmissible. If a client is able to obtain a pardon, it will permanently erase their Canadian criminal record, "and any consequences of inadmissibility resulting from it" within the Canadian jurisdiction.[6]

If a client's offence occurred outside of Canada, they clearly may be inadmissible on criminal grounds. Counsel will need to assess whether they are inadmissible.[7] In order to complete this assessment, a client "must provide . . . complete details of charges, convictions, court dispositions, pardons, photocopies of applicable sections of foreign laws(s), and court proceedings."[8]

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[3] Ibid. s.3(a),(b),(h),(i)

[4] **Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell : Refer to Chapter 6, Section 6.5 for more detailed guidelines on Equivalency. See also *Dahi v. Canada (MCI)*, 2010 CanLii 14334 (I.R.B) in the Case Law Section 6.8 for an example of conducting an equivalency analysis.**

[5] <www.cic.gc.ca/english/pdf/kits/guides/5312E.PDF> p.4

[6] <www.canadianintenration.gc.ca/san_francisco/imm/inadmissible-non_admissible.aspx?menu_id=29&menu=L>

[7] **Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Refer to Chapter 6, Section 6.5, p.29-32 for tips on how to apply the equivalency test to a client's particular situation.**

[8] <www.cic.gc.ca/english/pdf/kits/guides/5312E.PDF> p.4

As well, if a client was convicted as a juvenile, they may not be inadmissible. Unless your client received an adult sentence, was "convicted in an adult court in a country that has special provisions for young offenders", or was "convicted in a country that does not have special provisions for young offenders" but the severity of their offence would lead to them being tried as an adult in Canada,[9] they are *not* considered inadmissible on criminal grounds

The Importance of Language

> **Man acts as though he were the shaper and master of language, while in fact language remains the master of man.**
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> -Martin Heidegger

Before proceeding, we should address and stress the importance of language in considering a client's admissibility, particularly when their allegedly unlawful actions occurred in a different jurisdiction.

For example, the United States of America U.S. criminal dispositions are complex.10 A deferral of prosecution for one is not a conviction because it is like a stay under Canadian law. Deferral of conviction is similar to a conditional discharge and also is not a conviction. Nolo contendere is in effect a guilty plea and a conviction results. Deferral of sentence is also a conviction providing the sentence equates to Canadian law and is similar to a suspended sentence in Canadian law.

Also, we should note that absolute and conditional discharges are not convictions nor are probationary periods or reprimands. Further, peace bonds, diversion programs and withdrawals should not be held against your client. However, a conditional sentence *is* a conviction. Therefore, it becomes common practice to decipher handwritten court dispositions on various counts across a criminal vernacular that is not globalized.[11] Language remains our master, and goes a long way to dictating a client's fate.

B: WHAT A DIFFERENCE A DAY MAKES: WORKING TOGETHER TO REOPEN SENTENCES AND SEEK APPROPRIATE SENTENCING

Not long ago, a variation of the thin-skull rule from tort law held true for immigration lawyers; we had to take clients with criminal records as we found them and simply assess how we can assist them in light of their irrevocable sentences. This has changed. Options open to immigration lawyers have broadened, as have the considerations criminal lawyers ought to entertain when working for foreign nationals or permanent residents.

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[9] ibid

10 ENF 2/OP 18, p.60

11 **Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Refer to Chapter 6, Section 6.5 p. 31-32 for tips on how to interpret language in equivalency cases.**

Judicial Consideration of Immigration Issues during Sentencing

To review, a permanent resident is inadmissible on grounds of serious criminality (six month custodial sentence or offence carrying a maximum term of imprisonment of at least ten years), whereas a foreign national is inadmissible on grounds of criminality (indictable offence).12

With respect to sentencing, the following cases demonstrate what a difference a day makes.13

R. v. Truong, 2007 ABCA 127: Mr. Truong sought leave to extend the time for filing a notice of appeal from his sentence, which proceeded by way of joint submission. Notably, there was no discussion of Mr. Truong's immigration status during sentencing. While serving his sentence, Mr. Turong was deemed inadmissible and ordered to be deported due to his criminal record. That same day, Mr. Turong learned that because his sentence was "at least" two years, he had no right to appeal the decision to have him deported. He sought leave to file a notice to appeal his sentence despite the fact that his time to file had long since expired.

The judge found that the delay in filing the appeal did not prejudice the Crown and did not benefit Mr. Turong and so allowed his appeal, despite its lateness. The judge stated that **"[a]lthough the effect of a sentence on the immigration status of an accused ought not to determine the length of that sentence, it is generally understood as a factor which ought to be considered".** The judge noted that **where the immigration effects unknown or unappreciated until after sentencing, appellate courts have intervened to vary the sentence, even in circumstances where the original sentence was not manifestly wrong, particularly where that factor was not brought to the attention of the sentencing judge.** The fact that Mr. Turong took immediate action upon learning of the consequences of his sentence was found to be a mitigating factor. The judge concluded:

> **[13] A substantial injustice may occur were I not to exercise my discretion and grant leave in this case. While the difference between a two year sentence and a sentence of two years less a day may be seen as *de minimus* for sentencing purposes, the subsequent order for deportation may have an unduly punitive effect on the accused and his family. This is a consequence which was not put to the sentencing judge and which was not**

12 IRPA s. 36

13 The cases assume some familiarity with the Immigration Appeal Division, which, among other things, determines if someone will be allowed to remain in Canada due to criminal issues. As well as some familiarity with Division 7 of the IRPA, and, in particular, section 64, which limits appeal rights; there is no right to appeal if you are a "serious criminal", i.e., convicted of an offence punished by a term of imprisonment of at least two years.

> **considered by the applicant when he agreed to the joint submission. It is the combination of these factors which makes the granting of leave appropriate in this case. I do not suggest that the presence of any one of these elements alone would necessarily be sufficient to demonstrate that the requisite special circumstances have been demonstrated.**

R. v. Leila, 2008 BCCA 8 - Mr. Leila, Chilean permanent resident who had lived in Canada most of his life, pled guilty to a charge of possession of stolen property in 2006. He also pled guilty to two previous charges against him. The trial judge imposed a two year sentence plus time already served in respect to stolen property charge. Mr. Leila's immigration status in Canada was not raised by any party. Mr. Leila appealed the sentence because of the "serious and unintended collateral consequence(s)" of the sentence. Although the defence actively sought out a two year penalty so that the appellant would receive treatment in a federal institution for his heroin addiction, the defence was unaware that the two year sentence would effectively lead to a deportation order and no right of appeal. In this case, the British Columbia Court of Appeal decided that a sentence of two years less one day should be imposed based on the following reasons:

> **[23] I agree with appellant's counsel that the loss of the appellant's immigration appeal rights is a disproportionately severe collateral sanction, which was unforeseen by the appellant and his counsel at the sentencing hearing and apparently unintended by the sentencing judge. In the circumstances of this case, reducing the appellant's sentence to one which will allow him to preserve his immigration appeal rights is inconsequential to the sentence principles relied upon by the sentencing judge.**

Leila has been followed by the Saskatchewan Court of Appeal in Almajidi14, a case involving an individual convicted of sexual assault and assault with a weapon.15 The Court of Appeal cited Leila and affirmed the proposition that a sentence's unintended effect on immigration status can be a relevant factor on a sentence appeal. The accused was sentenced to two years less a day, plus two years of probation.

R. v. Nguyen, 2008 ONCJ 367 – Mr. Nguyen was convicted of abduction, an offence which may result in imprisonment for a term not exceeding 10 years. This made him inadmissible under section 36 of IRPA. The judge analyzed the

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14 R. v. Almadjidi, 2008 SKCA 56
15 R. v. Almajidi, [2008] S.J. No. 267

requirement that a sentencing judge consider the immigration impact of the criminal sentence:

> **[46] Were the Defendant therefore to receive a sentence of two years or more as a result of his convictions for abduction and dangerous driving, his avenue to challenge the deportation order would be lost by virtue of the length of the sentence imposed. A helpful review of this area of the law was provided by Justice Doherty in R. v. Hamilton at paragraph 156 supra.**
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> > **"The case law referable to the relevance of deportation in fixing an appropriate sentence addresses two very different situations. In the first situation, it is acknowledged that imprisonment is the only appropriate sentence. In the second, it is argued that a certain kind of sentence should be imposed to avoid the risk of deportation from Canada. In the first situation, the certainty of deportation may justify some reduction in the term of imprisonment for purely pragmatic reasons: R. v. Critton, [2002] O.J. No. 2594 (QL) (S.C.J.). In the second situation, the risk of deportation cannot justify a sentence, which is inconsistent with the fundamental purpose and principles of sentencing identified in the Criminal Code." Justice Doherty emphasises these words. "The sentencing process cannot be used to circumvent the provisions and policies of the *Immigration and Refugee Protection Act*. As indicated above, there is seldom only one correct sentencing response. The risk of deportation may be a factor to be taken into consideration in choosing among the appropriate sentence responses and tailoring the sentence to best fit the crime and the offender."**
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> **[47] While Justice Doherty spoke specifically to the legal notion that the sentencing process cannot be used to circumvent the provisions and policies of IRPA, he did indicate that in some very special cases, as he described it, there would be "room for consideration of the potentially added risk of deportation should the sentence be two years or more." He described the situation involving Mrs. Mason before the court on the Hamilton and Mason case and who faced deportation as the result of a sentence**

> **originally imposed as one in which, "The trial judge could look at the deportation consequences for Mrs. Mason by imposing a sentence of two years less one day, as opposed to a sentence of two years. I see this as an example of the human face of the sentencing process."**
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> **[48] While declining to characterize the loss of the potential remedy against a deportation order, or describing it as a mitigating factor on sentence, Justice Doherty certainly spoke in terms of the trial judge exercising what I would describe as "flexibility" in terms of the immigration consequences that any given sentence may have in certain very specific cases.**

The above survey of cases makes clear that criminal courts have been willing to consider sentence recalculations for permanent residents who have lost their right of appeal under the IRPA.

Of course, from our perspective, best practices from criminal lawyers would be to carefully consider clients' status in Canada and their long term interests when discussing sentencing with the Crown and clients. It may be wise to attempt to negotiate with the Crown an amendment of the information to a straight summary offence under the *Criminal Code of Canada* as opposed to a hybrid offence which is deemed indictable under the IPRA, where possible. In all cases, it would be best to ensure, wherever possible, that a client's sentence does not preclude the ability to appeal a potential removal order.

Immigration lawyers, before accepting your client's criminality, double check with criminal counsel to explore options that may be available to undo the effects of a criminal sentence – it may reposition your client and significantly increase their chances of remaining in Canada. We may not necessarily have to take our clients as we find them. Instead, some thought can be given to appealing clients' sentences if immigration factors were not weighed in the Reasons for Sentence.16

C: AN OFFENCE BY ANY OTHER NAME: OFFENCES UNDER THE IRPA

A New Kind of Client: Hybrid Offenders

Often, discussing the intersection between criminal and immigration law begins and ends with issues of inadmissibility and deportation. This is because a foreign national or permanent resident is deemed inadmissible after being convicted under any Act of Parliament, with the most prevalent being the *Criminal Code of Canada* (CCC) [17] and the *Controlled Drugs and Substances Act*.[18] In this

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16**Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Chapters 5 & 10**

17 R.S.C. 1985 c. C-46

context, the rubber of the Criminal Code meets the road of the IRPA, and offenders are transported out of the country. A new trend, however, has inverted this point of convergence as offences under IRPA are being prosecuted in criminal courts, and a new type of hybrid client has emerged, requiring the services of both immigration and criminal lawyers. This section will discuss this trend and give an overview of the offences these new clients are alleged to have committed.

Prosecuting Hybrid Offenders

The Treasury Board of Canada Secretariat published the following information:

> **In June 2006, the CBSA assumed responsibility for the criminal investigation and prosecution of certain offences under the *Immigration and Refugee Protection Act* (IRPA) in accordance with a signed Letter of Intent outlining the RCMP's and the CBSA's respective roles and responsibilities in the enforcement of offences under IRPA. Since June 1, 2006, CBSA investigators have been enforcing a wide range of offences under IRPA, such as entering Canada without authorization, use of fraudulent documents, aiding/abetting illegal entry and misrepresentation.**

In 2006–2007, the CBSA referred 424 criminal investigation cases to the Public Prosecution Service of Canada (PPSC) for prosecution. These cases pertain to criminal investigations under all border legislation that is the responsibility of the CBSA. Of these cases, 30% were offences under the IRPA. The CBSA's commitment to the enforcement of serious offences under IRPA has led to the completion of 89 criminal cases with a 95% rate for convictions in the CBSA's first year of undertaking these new responsibilities. Over 125 cases have already been referred to the PPSC, with another 50 investigations either in progress or with charges pending."[19]

In 2007-2008, CBSA's first full fiscal year in which it exercised its IRPA criminal investigation responsibilities in addition to those for customs offences, approximately 1,100 charges were laid in over 490 investigative cases. Of those 490 cases, 453 were concluded with a 91% conviction rate. It should be noted that the 2007–2008 conviction rate included data on overall criminal investigations for CBSA's three business lines (customs, immigration and food, plants and animals), which means there is no data on how many convictions there were under the Immigration Act proper.[20]

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18 S.C. 1996 c. 19

19 http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/bsf/bsf02-eng.asp -

20 http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/bsf/bsf02-eng.asp#s2x2x2; see also **Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Chapters 5 & 10**

As part of the Agency's efforts to "push the border out," the CBSA deploys officers abroad in key locations to gather intelligence related to the people. Migration integrity officers are the first opportunity for the Agency to identify high-risk people travelling to Canada and, in many cases, to stop them before they board an aircraft. Migration integrity officers gather, analyze and report on intelligence related to visa and immigration application fraud, irregular migration and other security concerns. Over 1,900 fraudulent documents were detected in 2008-09 via anti-fraud verifications. From 2008 to 2009, the CBSA increased the number of migration integrity officers from 44 to 55. These officers are now stationed in 45 locations, an increase from 39 locations over the previous year. The 11 new migration integrity officer positions are focused on anti-fraud activities and were implemented to work closely with Citizenship and Immigration Canada to enhance immigration program integrity.[21]

A new pilot project carried out in 2008-2009 evidences the CBSA's newfound propensity to identify and remove offenders. The project located 45 high-priority persons (i.e. serious criminals) subject to a warrant for removal. The project revealed that, of these persons, 21 (or 47 percent) had left Canada. The pilot project confirmed that focused and sustained efforts, increased coordination with internal and external partners, and the use of a wider variety of investigative techniques are effective in locating targeted individuals. Looking forward, the CBSA will examine ways of implementing the lessons learned on a national level to further reduce the warrants inventory.[22]

Before discussing these offenses in more detail, a final word about a current trend. In preparation for the 2010 Olympic and Paralympic Games, the CBSA delivered training on document examination and impostor detection to various audiences including CBSA trainers for port-of-entry recruit training, migration integrity officers, regional CBSA officers and staff of partner agencies and provincial governments. Similarly, to help combat fraud in the new Canadian Experience Class, the CBSA opened approximately 90 criminal investigations into employment, student and immigration consultant fraud. In support of this initiative, the CBSA received funding to combat fraud in both the Temporary Foreign Worker Program and the international student program.[23]

Practically speaking, these initiatives could signal the expansion of the CBSA's investigative focus to include to a broader range of crimes and offenders. Put another way, watch out for more prosecutions of immigration consultants and students.24

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21 http://www.tbs-sct.gc.ca/dpr-rmr/2008-2009/inst/bsf/bsf02-eng.asp#a2s2
22 Ibid.
23http://www.tbs-sct.gc.ca/dpr-rmr/2008-2009/inst/bsf/bsf02-eng.asp#so_7931_04
24**Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Chapters 5 & 10**

Offences under the IRPA[25]

Sections 117 to 150.1 of the Immigration Act deal with offences under the Act, which include people smuggling (s.117-121), possessing false documents in order to contravene the Act (s.122), and general offences (s. 124-131), including direct or indirect misrepresentations that potentially induce an error in the administration of the Act.

The following cases provide some insight into the types of offences that are being prosecuted under the IRPA, the range of sentencing that is being imposed by the courts, and the impact of sentencing on the immigration status of permanent residents.

Human Smuggling and Trafficking (s. 117 IRPA)

R. v. Alzehrani, 2008 – Elements of the Offence[26] This was a motion for a directed verdict in the accused's trial on 30 counts of conspiracy to smuggle persons across the Canada-U.S. border. In some cases, persons were smuggled from Detroit to Windsor in the trunks of cars. One person drowned during a smuggling attempt using jet skis. In other cases, persons were smuggled into the U.S. using freight trains, boats, trucks and cars. There was some evidence for each count in the indictment against Alzehrani that the conspiracy involved his assisting someone to cross the border. There was little evidence about these persons' lack of documentation to enter either Canada or the U.S. or about Alzehrani's knowledge of this.

The Court allowed the motion in part; on 23 of the 30 counts, there was no evidence one or more of the essential elements of the offence was made out. In cases where it was not clear the persons smuggled lacked the appropriate documents to cross the border, the counts could not be left to the jury. A directed verdict of acquittal was ordered in these cases. In cases where it was not clear whether or not Alzehrani knew whether the persons had documents or not, the counts were left to the jury, because wilful blindness as to the existence of the proper documents was enough to constitute the offence.

> **[10] There is very little jurisprudence interpreting this provision. However, from a review of what case law does exist, and from a plain reading of the statute, it seems clear that this is a specific intent offence: R. c. Muhigana, [2005] J.Q. No. 7806 (C.Q.) at para. 44. Further, in order to establish a breach of this section, the Crown must prove that: (i) the person being smuggled did not have the required documents to enter Canada; (ii) the person was coming into Canada; (iii) the accused was**

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25 **Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Chapters 5**

26 R. v. Alzehrani, [2008] O.J. No. 4422

> **organizing, inducing, aiding or abetting the person to enter Canada; and (iv) the accused had knowledge of the lack of required documents: R. v. Godoy, (1996) 34 Imm.L.R. (2d) 66 (Ont. Ct. J. (Prov. Div.)) at para. 14; R. v. Chen, [1998] O.J. No. 5506 (Ct. J. (Prov. Div.)) at para 5. Both the lack of documents and the accused's knowledge of that are essential elements of the substantive offence under s. 117 of IRPA.**
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> **...**
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> **[64] The Crown submitted that interpreting the legislation and applying the law in the manner I have done will make it virtually impossible to successfully prosecute those engaged in human smuggling. I recognize the difficulty, particularly when the individuals being smuggled are not apprehended or when the charge is conspiracy and the underlying crime itself is not completed. I do not understand why s. 117 of IRPA is limited to the smuggling of persons across the border who are without the required documents, as opposed to simply smuggling people across the border for whatever reason. However, if the manner in which the legislation is drafted makes it difficult to prosecute wrongdoers (which it does), and the wrongdoing is serious (which it is), the remedy lies in legislative reform, not by judicial interpretation that violates the plain meaning of the existing statutory language.**

Justice Mosley was not receptive to the idea that the accused was merely reckless, and not willfully blind:

> **[37] Counsel for the accused argued that the principle of wilful blindness has no operation in these circumstances because the accused knew their conduct was illegal in some way, but were completely indifferent to the purpose for which their "customers" wished to cross the border secretly. It was, for example, possible that a person wishing to cross the border secretly was doing so for a purpose even more sinister than the lack of a passport. The accused, it was argued, simply did not care about the people they were transporting. They were motivated entirely by greed and were indifferent to whether or not the persons being smuggled had the required documents. This, counsel submitted, means that the accused were merely reckless. They failed to make inquiries about why these persons wanted to be smuggled across the border, not because they wanted to avoid obtaining the knowledge, but because they simply did not care.**

[38] In my opinion, the scenario suggested by the defence makes the accused "poster boys" for the application of wilful blindness. They did not merely suspect something was wrong with the circumstances of their activity; they knew for certain that was the case. Their conduct goes far beyond recklessness. All of the conditions for wilful blindness are met. If the underlying facts required are accepted by the jury, it is open to them to apply the wilful blindness doctrine to impute knowledge to the accused.

R. v. Hallal, 2006 – Sentencing: In this case, the defendant pled guilty to conspiracy in relation to section 117(1) under the IRPA. With respect to the background facts, between August of 2001 and October of 2002, the RCMP conducted an investigation of a group of people involved in assisting migrants from India and Pakistan to enter the United States of America. The migrants traveled to Canada and then were assisted in crossing the border to the USA either by motor vehicle or boat. In terms of the overall conspiracy, approximately 200 persons were smuggled from Canada to the United States. The migrants were charged between $2,500 and $3,000 US to be smuggled from Canada to the US. With respect to this defendant, the evidence showed that in less than four months he was involved in the movement of 30 migrants and those 30 migrants were part of ten different operations.27

On sentencing, the Crown asked for a sentence of three years, while the defence asked for a conditional sentence. In sentencing the defendant to 18 months in custody, Justice Hawke stated:

[18] It seems to me that unless a conditional sentence is an obvious outcome on sentencing that there is an evidentiary burden on the defendant to show that he is not a risk in the community for re-offending. It is true that the court has greater concern with respect to this factor when one is dealing with violent offences, but being involved in a nonviolent offence alone is not a ticket to a conditional sentence.

[21] With respect to this matter, looking at the bigger picture, this is a serious offence. It has international implications. This defendant was actively involved in getting people across the border. He was not at the level of Mr. Tewena in terms of his role in the conspiracy, nor in terms of the length of time he was involved or the number of migrants that he had some responsibility for.

[22] In mitigation there is a plea of guilty. This is a significant plea that was taken at the preliminary hearing, and as I have said before, I will say again, it was a

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27**Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Chapters 5 & 10 for further case law.**

preliminary hearing that both the Court and Crown struggled to manage and, hence, the plea is significant.

[23] In my assessment a term of custody of 18 months is appropriate when everything is put in the balance. That will be served in jail, and for the reasons I stated earlier, it is my view that the defendant has not met the pre-conditions of a conditional sentence, and given what I have to work with from an evidentiary point of view, it would not be a fit sentence.

False Passports and Documents (s. 122 &123 IRPA)[28]

R. v. Aghani, 2008 CarswellOnt 4989 - Expert Testimony and Intent: The accused was charged with possessing and importing two Canadian passports contrary to sections 122(a) and (c) of the IRPA. The Crown sought to admit the testimony of Brian O'Connell, an Intelligence Officer with the Greater Toronto Enforcement Centre, as an expert witness. The areas in which the Crown sought to qualify him as an expert were in the methods used to obtain and prepare altered or blank passports, the uses that can be made of such passports, their street value, and how they may be distributed.

The defence objected to the admissibility of this evidence. A *voir dire* was held, during which Mr. O'Connell testified. After hearing submissions from counsel Justice Garton ruled that Mr. O'Connell's evidence was admissible. In his reasons the judge stated:

[22] Mr. O'Connell testified that a Canadian passport can be a very valuable part of the deals offered by smuggling rings to get people into Canada or the United States:

> **I know it's $40,000 U.S. [that the organizers] charge for a guaranteed admission to the United States out of China and that includes your passport, maybe most likely a Canadian passport as well because you would fly from Hong Kong directly to Vancouver or maybe into Los Angeles on a Canadian passport. The idea is to make a refugee claim when you arrive. So it's a very valuable document. It's part of the package. You get your ticket. You get your passport. Quite often, if you're paying top dollar, you will be part of a group and that group will have a leader to help you through the checkpoints on your journey. ... If you are ... admitted as a returning Canadian, everything is fine. Then you are met by**

28**Bellissimo, Mario and Louie Genova *"Immigration Criminality and Inadmissibility"* (2009) Carswell: Chapters 5 & 10 for further case law.**

> **an escort who will then smuggle you into the United States either in the back of a transport truck or trunk of a car, railroad, whatever, ... or use the altered Canadian passport to cross the border into the United States, depending on the package...**
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> **[38] The expert testimony proffered in this case is analogous in many ways to the expert testimony called by the Crown in prosecutions for possession of drugs for the purpose of trafficking. In both instances, the Crown, in addition to proving possession, must also prove the accused's intention with respect to a particular item – whether it be a passport or an illegal drug. Intention may be established by inference based on all of the circumstances. Expert testimony indicating the value of the prohibited item and describing the various ways in which it can be sold and used illegally provides the trier of fact with information that is both necessary and relevant in terms of assessing the circumstances and determining whether the Crown has established the requisite *mens rea* beyond a reasonable doubt.**

R. v. Lin, 2007 NLCA 13 - The appellant pled guilty to a charge of using a false passport to enter Canada, which constitutes an indictable offence under the IRPA. He appealed the eight month sentence imposed. He had also been charged with, and earlier pled guilty to five counts of assisting others to enter Canada with false passports.

The trial judge imposed a sentence of nine months on each count, after giving credit of approximately three months for pre-sentence custody, and ordered that the sentences be served concurrently. Mr. Lin appealed his eight month sentence on one charge on the ground that the trial judge failed to consider the principle of totality. The Appellant's position was that when the aggregate of all of the sentences arising out of the same circumstances is considered, the sentence imposed is unfit. Counsel argued that the fit sentence would be four to six months less appropriate credit for pre-sentence custody. In denying the appeal, Justice Wells stated:

> **[6] It must also be noted that, in 2001, Parliament replaced the previous statutory provisions with the revision now referred to as IRPA. One of the significant changes was increasing the maximum penalty under what is now section 123(1) (b) to 14 years from two years. That must be considered by courts to be a strong indication by Parliament that this offence requires serious punishment. Notwithstanding the dearth of precedent, we are not satisfied that the appellant has shown that,**

considering the sentences imposed on Mr. Lin in the aggregate, the sentence imposed in respect of the section 122(1) (b) offence is substantially above the normal level of the sentence appropriate for the most serious of the charges with which Mr. Lin has been charged. We are not; therefore, satisfied that Mr. Lin has shown that the sentence imposed under section 123(1) (b) is unfit.

R. v. Guifaro Zelaya, [2009] A.J. No. 33 – Sentencing: This case contains a frank judicial consideration of the novelty of offences committed under the IRPA –Judge L.R. Grieve admitted that at the onset of sentencing he was "not thoroughly familiar with the Immigration and Refugee Protection Act. Following in the footsteps of Judge Dunnigan,29 Judge Grieve found the offence sections in IRPA somewhat similar to Criminal Code sections. The accused was charged with the following offences, which the judge placed in order of severity:

- **Count Four, section 124(1)(a) of returning without authorization even with proper identification - carries a penalty of up to two years in jail.**
- **Count One, section 123(1)(a) of having a false passport - carries a penalty of up to five years in jail.**
- **Count Three, section 128(a), misrepresenting his identity and nationality in order to enter Canada - carries a penalty of up to five years in jail.**
- **Count Two, section 123(1)(b), using a false passport to enter Canada - carries a 14 year maximum. On a global basis with consecutive sentences the possible penalty is 26 years in jail, so obviously very serious crimes, with severe penalties available.**

The judge's decision itself provides an extensive and very useful overview of the cases related to sentencing presented by both parties. I would encourage anyone representing a client faced with similar charges to review this decision. A review of some of the cases revealed that on Count Four alone, merely returning after deportation without proper authorization, that for an accused with no record, the sentence can range from a fine to a three month jail term, depending on the circumstances. The other sentencing cases suggests that considerable custodial sentences are warranted for repeat offenders – that is, an accused that repeatedly and intentionally disregards the IRPA – as well as particularly notorious offenders, such as the accused in R. v. Kahan,30 who acquired a Canadian passport to assist him in his international travels and frauds committed around the world.

With respect to sentencing principles to follow in the future, Judge Grieve concluded that when the reward of success to the offender is great and detection

29 R. v. Otoroh (17 November 2006), Calgary, 061302139P1, 061255386P1, 06019728P1 (Alta.Prov.Crt.) [unreported]
30 (2004), 196 B.C.A.C. 16. The B.C. Court of Appeal thought a 23 month sentence was "low" given the circumstances.

difficult, courts stress punishment and deterrence, both generally and specific. On the facts of the case before him, Judge Grieve stated that factors such as; the offences are serous; the offences are prevalent in the community; the accused's actions were for his personal gain; the offences were planned and premeditated (not merely impulsive), all militate against finding the accused guilty but not entering a conviction.

Contravention of the Act (s. 52, 124 & 125 IRPA)[31]

R. v. Carnes, 2007 BCPC 390 - The accused, a foreign national against whom a deportation order was made, had returned to Canada without Ministerial permission (s.52(1)), and therefore was alleged to have committed an offence contrary to s.124(1) of the IRPA. Justice Gallagher rejected the accused's argument that the Crown is required to prove that the accused is a foreign national, giving the following reasons for his finding.

> **[33] The Crown has listed four elements to the offence:**
> **1). There was a removal order issued against the foreign national.**
> **2). The removal order was enforced.**
> **3). The foreign national returned to Canada.**
> **4). The foreign national did not obtain authorization from the Ministry to return.**
>
> **[34] Defence submits that the list is not complete, one element of the offence is missing, namely that the accused be a "foreign national." Section 52(1) of the *Immigration and Refugee Protection Act* uses the words "foreign national" and not the word "person." When parliament uses specific terminology there is an intent on the part of parliament that the section be interpreted with the specific meaning. The section must therefore be interpreted with the words "foreign national" defined in the Act at section 2, to mean a person who is not a Canadian citizen or a permanent resident and includes a stateless person. The defence submits the Crown's interpretation of section 52 simply ignores the word "foreign national" as if parliament had used the word "person." The Act ought to be read in the context of section 6 of the *Charter,* and if the Court is unsure how the section should be interpreted then the stricter interpretation favouring the accused ought to be used.**
> **....**

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I disagree with defence that "foreign national" is an element of the offence that needs to be proven beyond a reasonable doubt.

[48] <u>A person against whom a removal order has been enforced is a foreign national</u>. It is through analysis of Section 2 (the definition section) and Division 5 (enforcement sections) of the Act that the status of "foreign national" is established. The Crown is not required to prove the accused is a foreign national. It is not legally possible to deport citizens or permanent residents, therefore a person who has been deported by definition is a foreign national.

<u>R. v. Williams, 2008 ONCA 173 – Burden of Proof</u>: This appeal also dealt with a person returning to Canada without Ministerial permission. The appellant argued that the burden was on the Crown to prove that he did not have the written consent of the Minister and since it failed to do so, he should have been acquitted. In the alternative, the appellant appealed against the sentence of seven months imprisonment. Justice Rosenberg provided the following reasons for allowing the appeal:

[3] In my view, the burden was on the Crown to prove that the appellant did not have the Minister's consent to return to Canada. I am also satisfied that the Crown failed to adduce sufficient evidence to make out that element of the offence and, accordingly, the conviction was unreasonable....

[34] At the conclusion of the Crown's case, the only possible circumstantial evidence of lack of written consent was the falsehood contained in the appellant's Immigrant Visa and Record of Landing. During the defence case there was the additional falsehood in the citizenship application.

[35] I am not satisfied that the falsehood on the Immigrant Visa and Record of Landing is a sufficient basis for a conviction. While one might be able to infer something about the appellant's conduct or state of mind from this falsehood, the point in issue is not the appellant's state of mind but the conduct of the Minister. The citizenship application falsehood also cannot be the basis for inferring that the appellant did not have written

consent when he entered Canada some eight years earlier.32

Misrepresentation (s. 127 & 128 IRPA)33

Zhong v. R., 2008 BCSC 514 – False Statements on a Visa Application:
This was an appeal of a conviction for making false statements on an immigration application to renew a student visa. With the assistance of a consultant, of sorts, the accused provided false transcripts and acceptance documents in support of his study permit renewal application. The Appellant argued that he did not know, and, therefore, the Court could not infer, that the accused was aware that the documents were false. Justice Dillon explained that the trial judge did not err in finding appellant had knowledge:

> **[20] It was a reasonable inference on the whole of the evidence that a payment of $8,000 must have been for more than completion of an application. The fact that the Appellant had paid a minimum amount on several occasions previously is evidence of a reasonable amount to be paid for an application. I do not accept that the trial judge had to consider that Du's self description as an immigration consultant automatically put his fees into a different service category than the school based consultant. Zhong was aware that Du suggested making a study permit renewal application and had sent material to him for that purpose. He then sat back and waited when he knew that his study permit had expired. It was reasonable to infer a motive for fraud based upon the $75,000 investment that was in jeopardy if Zhong did not remain in Canada.**
>
> **....**
>
> **[23] There was evidence remaining after rejection of the Appellant's evidence upon which the trial judge could infer an intention to misrepresent and so convict. The *actus reus* of the offence was admitted and clear. The application contained a copy of the Appellant's passport. The Appellant was not a student at the time that the application was made and his permit had expired. The Appellant was aware that Du suggested making a study permit application, among other routes to status. He**

32 The relevant section of the Act (s.55) has since been repealed and replaced by s. 52 of the IRPA, which also allows for an officer to authorize the return of a previously removed person. It also provides that such a person may be authorized to return in "other prescribed circumstances". An accused will now generally be in the best position to know whether other circumstances apply.

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> **forwarded his student transcripts to Du and nothing else. He paid an "enormous" fee relative to what he had paid before.**

<u>R. v. Hupang, 2008 BCCA 4 Minor Misreps = Minor Sentences (?)</u> – Mr. Hupang was Chinese national studying at a private college in Canada. The college went bankrupt and Mr. Hupang lost his tuition and his student status. Wanting to remain in Canada, he found a service online that would prepare counterfeit documents that could help him achieve this purpose. He attached false school transcripts and a false acceptance letter to an application to renew his expired study permit. The sentencing judge considered a discharge, but imposed a custodial sentence:

> **[9] It is my view that a discharge, while it might very well be in Mr. Hupang's best interests, would be contrary to the public interest. The public interest in this case, in my respectful view, is paramount. The public interest includes the issue of national security and international security. Canada must be seen as a nation that will not tolerate illegal immigrants. It must be seen as a nation that will protect the integrity of our national security and the security of our neighbour to the south. If we do not do that all of our borders will be closed, the walls will be built, and we will be in a very isolated and dangerous situation.**

The B.C. Court of Appeal disagreed with the sentence:

> **[8] In my view, the sentencing judge erred in viewing the circumstances of this case as one calling for a sentence designed to deter terrorists and others intending to operate illegally in Canada. In focusing on what he perceived to be general threats to national and international security, he lost sight of the actual circumstances of this offence and this offender. Mr. Hupang is a young man without any criminal record who entered Canada legally at the age of 18 to study here and to improve his circumstances. When he was apparently taken advantage of by an educational institution here, he made an extremely foolish choice to use illegal methods in an effort to continue his studies. That choice has had devastating consequences for him and has brought shame to him and to his family. He has already spent 17 days in jail; he has a criminal record, and he is facing certain expulsion from the country, with little prospect of ever being able to return.**

[9] The sentencing judge was advised that this may well have been the first case of its kind to come before the courts; that is, where an individual had used false documents simply to extend his stay in Canada for otherwise lawful purposes. Subsequent to this decision, in R. v. Zhong...a provincial court judge found Mr. Zhong guilty of a charge under the Act of attempting to extend his visa by fraudulently representing himself to be a student. The trial judge disbelieved Mr. Zhong's explanation and denials of guilt. By the time the matter came on for trial and sentencing, Mr. Zhong had spent 3 months in jail. In very brief reasons, the trial judge sentenced him to a term of imprisonment of 3 months, or time served. Neither of the other cases provided by counsel bear any resemblance to the circumstances here.

[12] In all of the circumstances, I am satisfied that the sentencing judge erred in his approach to the issue of general deterrence and in imposing a sentence that was unfit as being disproportionate to the circumstances of the offence and the offender. I would allow the appeal, set aside the custodial sentence, and impose a sentence of 17 days imprisonment, representing time already served. I would not alter the further term of a $2,500 fine. While I am satisfied that this is the appropriate sentence for Mr. Hupang at this point, I would not wish these reasons to be read as necessarily requiring a sentence of imprisonment for all similar contraventions of s. 127(a) of the Act. The Act does not set forth a minimum penalty and each case must be dealt with on its own facts.

R. v. Pandher - [2009] O.J. No. 5860- In this case, Justice McLeod was notably aggrieved by his inability to impose a custodial sentence; the judge expressed a firm belief that Mr. Baldev/Pandher should be in jail, however, he had a heart condition, which militated in favor of accepting the joint submission of a conditional sentence. Most of the decision is reproduced here.

[1] K.L. McLEOD J. (orally):— Mr. Pandher has pleaded guilty to two charges under the Immigration Act basically for fraud. As an immigration consultant, it appears he made material misrepresentations to the government about the financial stability, or otherwise, of his clients. Not only did he make material representations, he also produced fraudulent documents unbeknownst, apparently, to his clients who he charged an exorbitant amount of money. It is, frankly, people like Mr. Pander -- is it Baldev Pandher or Pandher Baldev?

...

> **[4] THE COURT: People like Mr. Pandher who give such a bad name to immigration consultants, and why they are held in such low regard and with such great suspicion.**
>
> **[5] Any sentence, because of these significantly criminal acts, should reflect not only the court's extreme denunciation of his actions, which again strike at the heart of the security of this country, but also really take advantage of some desperate people who are trying to get their families into the country, and expose them to prosecution; all for the almighty dollar. So a sentence must reflect this court's denunciation and message to other people who are in the same business, and I mean that fraudulent business as Mr. Pandher, that should they continue in such an organization and -- sorry, with such an organization that they will be penalized, and as a message to Mr. Pandher.**

Thus, although we cannot say we have a new class of criminals as many of these offences existed before the implementation of the IRPA, we may have a more criminals by virtue of IRPA related convictions. So when a client approaches you with criminality you may have to look no further than the IRPA.

D: Federal Court Interpretation of Criminal Law Principles

While it may be fair to assume that most criminal law principles are similarly interpreted and applied across the board, principles relating to calculating sentences has unique treatment by the Federal Court. As the following cases demonstrate, the Federal Court has carved out a principled exception to the general rule.34

R. v. Mathieu, 2008 SCC 21 - In this case, the Supreme Court of Canada ruled that pre-sentence custody is not to be considered part of the sentence for the purposes of section 731(1) (b) of the Criminal Code. The Court stated:

> **The term of imprisonment is the term imposed by the judge at the time of sentence. Pre-sentence custody is not part of the sentence, but is only one factor taken into account by the judge in determining the sentence. This conclusion is dictated by, inter alia, s. 719(1) and (3) of the Criminal Code and is also consistent with the presumption of innocence and the objectives of**

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> **sentencing. The words "imprisonment for a term not exceeding two years" used in s. 731(1)(*b*) refer to the custodial term imposed at the time of sentence — the actual term of imprisonment imposed by the court after taking into account any time spent in pre-sentence custody. Consequently, the appeals all involve prison sentences of less than two years and it was therefore open to the judges to make the probation orders in question.**

It appears that the decision in *Mathieu* challenges the findings of the Federal Court in decisions such as *Atwal*,35, and similar jurisprudence. In *Atwal*, the court ruled that pre-sentence custody should be added to the length of a sentence when determining if a permanent resident has been "punished in Canada by a term of imprisonment of at least two years" (and therefore has lost the right to appeal to the Immigratio Appeal Division).

Previously, we were hopeful that the Federal Court would not distinguish the findings of the Supreme Court in *Mathieu* when deciding cases in the immigration context and in considering whether a person retains their right to appeal their removal order to the IAD. That is, we were hopeful that it would not be appropriate for a decision maker to consider pre-trial custody in determining the term of imprisonment.

Since then, the apparent discongruence has been addressed by the Federal Court, however, who has deemed the procedure outlined in *Atwal* to be a legitimate and principled exception to the principles articulated in *Mathieu*.36

Ariri v. Canada (Minister of Public Safety) [2009] F.C.J. No. 964 - The applicant had been convicted of fraud over $5,000, following which the Immigration Division issued a deportation order against him due to serious criminality. He had lost his right to appeal because he had been punished by a term of imprisonment that was at least two years. In June 2008, the applicant filed a motion to re-open his appeal against the deportation order on the basis of the Supreme Court of Canada decision in *Mathieu*, and asserted that there had been a breach of natural justice as his pre-sentence custody should not have been considered punishment and he should therefore have retained his right of appeal. After a review of the parties' submissions and material, including the transcript of the guilty plea, as well as consideration of two recent IAD decisions dealing with the impact of *Mathieu* on the interpretation of subsection 64(2), the IAD determined that the initial determination that he had lost his appeal was correct in law both then and now. The IAD found that there had been no breach of

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35 M.C.I. v. Atwal, 2004 FC 7. See also Brown v. Minister of Public Safety and Emergency Preparedness, 2009 FC 660.

36 See Ariri v. Minister of Public Safety and Emergency Preparedness, 2009 FC 834, and Nguyen v. Canada (M.C.I.), [2010] F.C.J. No. 79

natural justice.37 Mr. Ariri's application for judicial review before the Federal Court was dismissed, with authority:

> **[18] The Federal Court has repeatedly agreed that it would defeat the intent of Parliament to leave out consideration of pre-sentence custody under IRPA where it was expressly credited towards the punishment imposed in the criminal context as part of the term of imprisonment. To interpret it otherwise would effectively create incongruity regarding the "threshold" of criminality which Parliament chose when enacting subsection 64(2) of IRPA (Magtouf v. Canada (Minister of Citizenship and Immigration), 2007 FC 483 at paras. 19-24; Canada (Minister of Citizenship and Immigration) v. Smith, 2004 FC 63 at paras. 9-10; Canada (Minister of Citizenship and Immigration) v. Gomes, 2005 FC 299 at paras. 18-19; Cheddesingh v. Canada (Minister of Citizenship and Immigration), 2005 FC 667 at para. 14; Jamil v. Canada (Minister of Citizenship and Immigration), 2005 FC 758 at para. 23; Shepherd v. Canada (Minister of Citizenship and Immigration), 2005 FC 1033 at paras. 11-15; Cheddesingh v. Canada (Minister of Citizenship and Immigration), 2006 FC 124 at paras. 28-29).**
>
> **[19] Furthermore, the Federal Court decisions cited above apply the purposive approach used by the Supreme Court in Mathieu and are consistent with what the Supreme Court referred in the latter decision as the ability on an exceptional basis to treat the time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence. (Mathieu, above, para. 7)**

E. CONCLUDING REMARKS

As immigration lawyers representing clients with criminal records we immerse ourselves in a different world that is not always easily comprehensible. Although criminal law evidentiary standards are not transferrable to immigration (administraive) law princples, diligent practitioners should always make best efforts to import criminal law evidence and its protetcions to the immigration context. To take one example, if criminal counsel has argued vehmently for an agreed statement of fact on a conviction (plea, sentencing or otherwise) do not allow that work to be undone by not objecting to the use of one sided, unproven allegations found in documents such as arrest records, and occurrence reports

37 The IAD cited: Mihalkov v. M.P.S.E.P., [2008] I.A.D.D. No. 1246, (IAD file TA7-05378) October 21, 2008; Nana-Effah v. M.P.S.E.P., [2008] I.A.D.D. No. 1303, (IAD file MA8-02628) October 29, 2008).

before immigration officers and tribunals. In short, understanding how criminal law is applied and shaping and advocating that intersection with immigration principles is the chief responsibilty of immigration counsel in advocating for our clients.

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