



THE CANADIAN
BAR ASSOCIATION

COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

CONSIDERATIONS FOR LAWYERS



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Collateral Consequences of Criminal Convictions: Considerations for Lawyers

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INTRODUCTION

Crown and defence counsel in criminal proceedings often consider their responsibility to an accused person ending with the close of court proceedings. If an acquittal results, counsel may not consider what happens with records generated as part of the prosecution. If a conviction is the outcome, counsel may not feel responsible for factoring in potential ongoing collateral civil implications when speaking to sentence. For example, the offender's employment or future plans may be restricted because of travel limitations, or the offender may be unable to pay a court-imposed fine and face ongoing penalties as a result. But, if not the job of counsel at the sentencing hearing, who will advise the offender of potential additional implications of a finding of guilt, beyond incarceration? Who will be responsible for ensuring that all likely collateral consequences of a conviction are before the court in arriving at a just sentence, viewed comprehensively?

Prosecutors need to ensure that full and accurate materials are forwarded to numerous decision-makers and bodies that may deal with an offender after sentencing. Defence counsel need to consider and communicate to the court all implications of a finding of guilt that may lead to barriers to an offender's future prospects and/or successful reintegration into society following incarceration. Such consequences can be impediments to employment, housing, voting, volunteering and even, for non-citizens, remaining in Canada. More important, before a client pleads guilty or, following a contested trial, soon after the finding of guilt is registered, defence counsel need to ensure that clients themselves fully understand how their situations may change in the future (or have already changed).

The Canadian Bar Association's Criminal Justice Section and Committee on Imprisonment and Release have created this resource¹ to assist lawyers to tackle these challenges. Each chapter concludes with a checklist of considerations for counsel. The report also includes an annotated bibliography of additional resources prepared by the University of Toronto Department of Criminology and a provincial and territorial directory of relevant legislation (prepared with the help of Pro Bono Students Canada volunteers).

PLEASE NOTE: The information in the report will change rapidly, in response to international, national, provincial and territorial legislative and policy changes. Given the breadth of the subject matter and the challenge of keeping it current and accurate, we ask for your help in providing ongoing corrections, additions and updates.² **This report is not intended to provide legal advice, but rather preliminary tips and information to flag issues for further exploration. It is a starting point to assist lawyers in considering the hidden and potentially long-lasting repercussions that offenders often face following a finding of guilt, even for relatively minor offences. Each section of this report concludes with a checklist of considerations for counsel, but the tips there are also intended to point counsel to some pertinent areas for further exploration and may not be comprehensive (or correct) in all situations.**

¹ The CBA acknowledges and thanks numerous contributors to this project, including Justice David Cole, Melissa Azevedo, Kim Crosbie, Abby Deshman, Mary Campbell, Andrea Shier, Mariana Valverde and many others, as well as law student volunteers with Pro Bono Students Canada.

² Please write to [CBA Criminal Justice Section](mailto:cbacriminal@cba.org) (cbacriminal@cba.org), at CBA National with any corrections or suggestions.

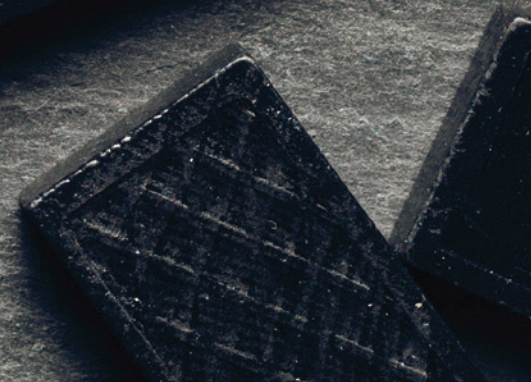
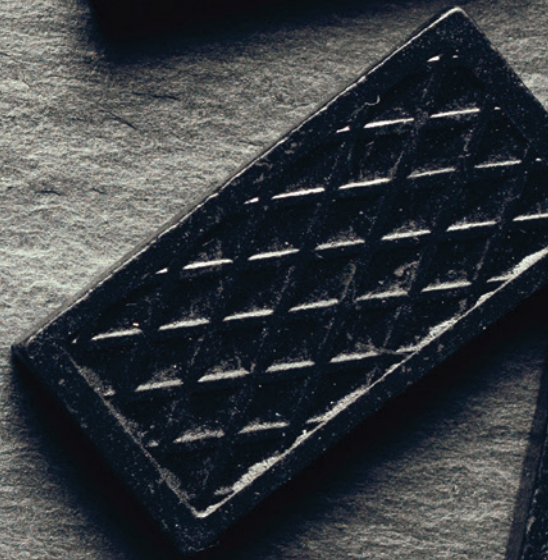
We hope that this will be an evolving tool that will stimulate dialogue among judges, defence counsel, prosecutors, legal aid providers, legal services organizations, correctional officials, public policy experts, community groups, prisoners' rights organizations and other concerned justice system participants.

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DEPORTATION AND CITIZENSHIP



DEPORTATION AND CITIZENSHIP

YOUR CLIENT ASKS:

What happens to my immigration status if I'm found guilty?

Since 2002, the *Immigration and Refugee Protection Act (IRPA)* has been the primary federal legislation regulating immigration in Canada. Significant changes were made to the legislation in June 2013.³

Section 2 provides definitions pertaining to immigration status of permanent residents (formerly classified as landed immigrants) and foreign nationals. To summarize:

A **permanent resident** is an individual who is not a Canadian citizen but has been granted the right to enter, live and work in Canada. A permanent resident may lose their status if they are found inadmissible for serious criminality or organized crime and a removal order against them comes into force.

A **foreign national** is neither a Canadian citizen nor a permanent resident. Foreign nationals can include stateless persons, students, visitors, tourists, refugees and temporary workers. If convicted of even a single minor offence, a foreign national could be found inadmissible and ultimately removed from Canada, although the situation differs for refugees.

A. Immigration and Refugee Protection Act

Criminal Inadmissibility

People can be deemed inadmissible to Canada for many reasons, and one reason is for criminal activity as a consequence of either 'serious criminality,' 'criminality' or 'organized criminality.'⁴

Serious criminality is governed by section 36(1) of the *IRPA* and applies to both permanent residents and foreign nationals.

Criminality is governed by section 36(2) of the *IRPA* and applies exclusively to foreign nationals.

Organized criminality is governed by section 37 of the *IRPA* and applies to both permanent residents and foreign nationals.

Serious criminality

Under section 36(1)(a) of the *IRPA*, a permanent resident or a foreign national convicted of an offence punishable by a maximum term of imprisonment of at least ten years, or an offence under an Act of Parliament⁵ for which six

³ S.C. 2013, c. 16.

⁴ See also "Division 4 – Inadmissibility" of the *IRPA* for additional grounds of inadmissibility. For an additional resource for this section of the report, see Mario D. Belissimo, C.S., *Canadian Citizenship and Immigration Inadmissibility Law, 2nd edition* (Toronto: Carswell, 2014).

⁵ Federal bills that have been passed by the House of Commons and the Senate, received [Royal Assent](http://canadaonline.about.com/cs/parliament/g/royalassent.htm) (<http://canadaonline.about.com/cs/parliament/g/royalassent.htm>) and been proclaimed. Note that if a non-citizen is convicted under a provincial statute and sentenced to jail, regardless of the length of sentence, they will not be found inadmissible under the *IRPA*.

months imprisonment or more has been imposed is inadmissible and can be removed for ‘serious criminality’. Under sections 36(1)(b) and 36(1)(c) of the *IRPA*, ‘serious criminality’ may also result from a conviction or commission of an offence outside of Canada for which the maximum penalty in Canada would be ten or more years.

Criminality

Under section 36(2) of the *IRPA*, a foreign national is inadmissible and can be removed for ‘criminality’ for a conviction in Canada for an indictable or hybrid offence or a conviction for two straight summary offences⁶ not arising out of a single occurrence. ‘Criminality’ can also apply to a conviction or commission of an offence outside of Canada equivalent to an offence punishable by indictment in Canada.

Organized criminality

In addition to inadmissibility under section 36, under section 37(1)(a) a permanent resident or foreign national is inadmissible for being a member of an organization believed on reasonable grounds to be, or have been, involved in a pattern of criminal activity planned and organized by people acting together to commit an indictable offence, acting toward such an offence outside of Canada or engaging in activity that is part of such a pattern. Note that section 37 requires only a finding on reasonable grounds, rather than a conviction, so any admission of facts could harmfully impact an individual’s case. Note too that section 37 is more serious than section 36, as the only way to overcome inadmissibility is through personal intervention by the Public Safety Minister (section 42.1).

Under section 37(1)(b) of the *IRPA*, a permanent resident or a foreign national is also inadmissible on grounds of organized criminality for engaging in activities like “people smuggling, trafficking in persons or the laundering of money or other proceeds of crime” in the context of transnational crime.

IRPA and hybrid offences

Most offences in the *Criminal Code* are hybrid offences, meaning that Crowns have discretion to prosecute either summarily or by indictment. Under section 36(3) of *IRPA* however, all hybrid offences are treated like indictable offences, even if the Crown elects to prosecute the offence summarily.

Permanent Residents

If a member of the Immigration Division of the Immigration and Refugee Board (IRB) determines that a permanent resident is inadmissible for ‘serious criminality’ under section 36(1) of the *IRPA* or ‘organized criminality’ pursuant to section 37 of the *IRPA*, a deportation order will be issued (although it will not come into force if there is an appeal right until that right is exhausted).

Under section 64(1) of the *IRPA*, permanent residents inadmissible due to a conviction in Canada and sentenced to imprisonment of six months or more⁷ are ineligible to appeal their removal from Canada to the Immigration Appeal Division (IAD) of the IRB, and are subject to removal. The law treats all permanent residents the same regardless of

⁶ Indictable offences are the more serious criminal offences, and can include the maximum penalty of life imprisonment. Summary offences are less serious and punishable by shorter prison sentences and smaller fines. See section 787 of the [Criminal Code of Canada](http://laws-lois.justice.gc.ca/eng/acts/C-46/) (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>).

⁷ Prior to the legislative changes in 2013 (S.C. 2013, c. 16), individuals sentenced to less than two years in jail were eligible to appeal a removal order to the Immigration Appeal Division.

how long they have spent in Canada.

In determining the total length of sentence, any pre-sentence custody expressly credited toward an individual's sentence will be factored into the total sentence under the *IRPA*. Also, the length of sentence is applied to each individual offence and not to the global sentence. So, when an individual is convicted of more than one offence, consecutive sentences each less than six months may avoid inadmissibility issues, or preserve a right of appeal.⁸ The Federal Court of Appeal has found that an officer's finding that a conditional sentence⁹ is a 'term of imprisonment' under *IRPA* falls within a range of reasonable outcomes, but note that the opposite finding may also be in that range.¹⁰

If a permanent resident is facing the possibility of removal, they have the opportunity to make submissions to the Canada Border Services Agency (CBSA). For those ineligible to appeal a removal order, these submissions may be the only opportunity to address why a removal order should not be issued. Unless the CBSA officer is swayed by the individual's submissions, under section 44(1) of the *IRPA*, a report is prepared by the officer and then sent to the Minister in preparation for a hearing. Under section 44(2), if the Minister's delegate believes the report is well-founded, the report may be referred to the Immigration Division (ID) for an admissibility hearing to determine if a removal order should be issued.

If a removal order is issued by the ID, and the permanent resident is eligible to appeal the order, the IAD can stay the order on humanitarian and compassionate grounds. The following factors may be considered:

- the seriousness of the offence(s) leading to deportation;
- possibility of rehabilitation;
- length of time spent in Canada and the degree to which the appellant is established;
- family in Canada and how the appellant's deportation would result in the dislocation of family members;
- support available for the appellant not only within the family but also within the community; and
- the degree of hardship that would be caused to the appellant by the return to their country of nationality.¹¹

The IAD can allow the appeal (section 67), reject the appeal (section 69) or stay the removal (section 68). Staying the removal means that the IAD places an individual on terms and conditions for a period of time (usually between two and five years). If the permanent resident breaches the terms and conditions, the appeal may be reconsidered. If convicted of another indictable or hybrid offence under section 36(1) (see section 68(4)) within the time period, the stay is cancelled by statute and the permanent resident is subject to immediate deportation from Canada, with no further right of appeal.

⁸ *R. v. Hennessy*, [2007] ONCA 581.

⁹ Conditional sentences are served in the community and are commonly longer than an equivalent sentence served in custody. Conditional sentences are intended to reflect situations of less serious criminality and punishment.

¹⁰ The decision in *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2014] F.C.J. No. 1106, that a conditional sentence was not a term of imprisonment was overturned by the Federal Court of Appeal, and the Supreme Court of Canada granted leave in April 2016. Until the issue is settled, it may be safest to treat conditional sentences as sentences served in custody.

¹¹ Non-exhaustive factors considered in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4.

If a permanent resident does not meet the appeal eligibility requirement because of being sentenced to six months or more imprisonment, humanitarian and compassionate grounds cannot be considered by the IRB.

Foreign Nationals

A foreign national convicted of the relevant offences in Canada may be found inadmissible for ‘serious criminality’ under section 36(1) of the *IRPA* or ‘criminality’ under section 36(2) of the *IRPA*, until granted a record suspension or exceptional relief. Under sections 63(2) and (3) of the *IRPA*, foreign nationals have the right to appeal a deportation order to the IAD only if they hold a permanent resident visa, or are considered protected persons (such as refugees). A sponsor can appeal a denial of a visa on grounds of inadmissibility against a family member, but it will not prevent removal.

If none of these factors apply, foreign nationals have no right of appeal and may be removed if convicted of more than one summary offence (not arising out of the same occurrence) or hybrid or indictable offence(s).

A foreign national may remain admissible only if convicted of a single straight summary (non-hybrid) offence for which a term of imprisonment of six months or less was imposed.

Rehabilitation

If individuals have a criminal conviction inside Canada for which they would be found to be inadmissible, they must get a record suspension (formerly a pardon) from the Parole Board of Canada before becoming admissible to Canada.

Foreign nationals who have had two or more summary convictions are no longer inadmissible if at least five years have passed since all of the sentences imposed were served and there are no other convictions.

If individuals have a conviction in Canada and a conviction (or equivalent offences) outside of Canada, they must obtain both an approval of rehabilitation and a record suspension to overcome inadmissibility.

Youths

Pursuant to section 36(3)(e)¹² of the *IRPA*, permanent residents and foreign nationals convicted as youths under the *Youth Criminal Justice Act (YCJA)* or the former *Young Offenders Act* cannot be found criminally inadmissible under sections 36(1) and (2) of the *IRPA*. However, there are exceptions to this where the youth received an adult sentence. Note too that admissions of fact in a plea could render a youth inadmissible under section 37, or possibly section 36(2)(d).

B. Other Immigration Considerations

Canadian Citizenship

A criminal record may hinder a permanent resident from becoming a Canadian citizen. For example, under section

¹² In addition to excluding youth from the inadmissibility provision of *IRPA*, inadmissibility may also not be based on offences designated as ‘contraventions’ under the *Contraventions Act*.

21 of the *Citizenship Act*, to become a Canadian citizen an applicant must be in Canada for a set number of days. Excluded from this calculation are any days when a permanent resident is under a probation order, subject to parole and confined to a penitentiary, jail, reformatory or prison.

Individuals charged or convicted with an indictable offence (not hybrids like under the *IRPA*) within three years of applying for citizenship are also ineligible for Canadian citizenship.

Sponsoring Family Members

Under section 133 of the *Immigration and Refugee Protection Regulations* (the Regulations), a conviction or incarceration could have immigration consequences for both Canadian citizens and permanent residents who hope to subsequently sponsor family members into the country. Even a permanent resident or citizen not at risk of being found inadmissible for criminality can be barred from sponsoring if they have been convicted of offences of a sexual nature, indictable offences involving the use of violence or an offence that results in the bodily harm against current or former family members. This ban is lifted if a pardon is obtained, or five years have passed since completion of the sentence.

Findings of Guilt and Travel

Prior to resolving a criminal matter, find out if your client wants or needs to be able to travel in the future. Individuals found guilty of a criminal offence or whose criminal matters are before the court and wish to travel in future should consult a lawyer specializing in immigration matters in the relevant country to determine any potential inadmissibility issues.

Inadmissibility and Sentencing

The risk of deportation of a permanent resident without a right of appeal or the inadmissibility of a foreign national can be a factor taken into consideration at sentencing.¹³

Some appellate courts have recognized immigration consequences for permanent residents initially sentenced to two years or more in jail by reducing the sentence to two years less a day, preserving the right of appeal under the former legislation.¹⁴ Appellate courts have relied on section 718(1) of the *Criminal Code* which directs that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.¹⁵ Similarly, other courts have granted discharges to accused facing unduly harsh immigration consequences as a result of a conviction.¹⁶

Despite the fact that immigration consequences are a legitimate factor to be taken into account at sentencing, if the appropriate sentence falls far beyond the established range for an offence, judges are unlikely to reduce a sentence solely to preserve a right to appeal of a removal order.¹⁷

¹³ *R. v. Pham*, 2013 CanLII 1518 (SCC).

¹⁴ Under changes to *IRPA* in June 2013, the threshold for loss of appeal rights changed from two years less a day to six months.

¹⁵ *R. v. Kanthasamy* (2005), BCCA 135 (B.C.C.A.); *R. v. Curry* (2005), 32 C.R. (6th) 376 (Ont. C.A.); *R. v. Lacroix* (2003), CanLII 36164 (Ont. C.A.); *R. v. Tigse* (2006), O.J. No. 1329 (Ont. C.A.).

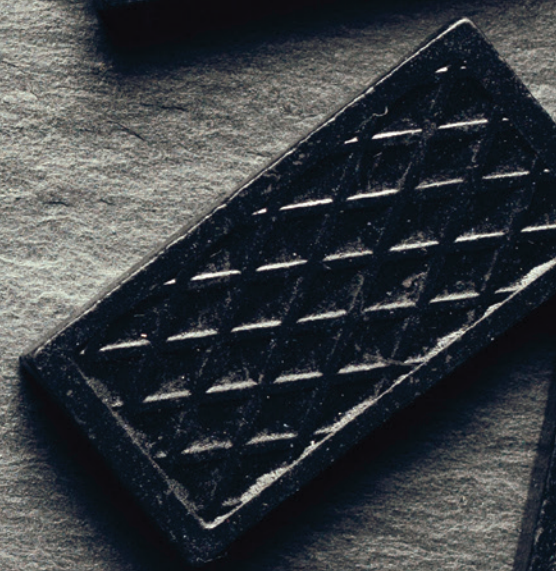
¹⁶ *R. v. Abouabdellah* (1996), 109 C.C.C. (3d) 4777; *R. v. Kanthasamy* (2005), BCCA 135 (B.C.C.A.).

¹⁷ *R. v. Morgan* (2008), NWTCA 12, 239 CCC (3d) 187; *R. v. Martinez-Marte* (2008), BCCA 136; *R. v. Polio* (2010) ONCA 769.

Counsel Considerations

- Suggest mitigating exposure by participating in relevant counseling programs or completing a period of community service so the court may be more inclined to consider a non-conviction outcome, plea to a lesser offence or more favorable sentence.
- Remember that the calculation of time spent in custody is applied to each individual offence and not the global sentence. Where the position on sentence is more than six months in jail, consider entering a plea to more than one offence, where the sentence for each offence is less than six months, and request that the sentences be served consecutively.
- Keep in mind that any pre-sentence custody expressly credited toward sentence will be factored into the total sentence in determining inadmissibility.
- Remember that the distinction between conditional sentences and those sentences served in custody is unsettled at this point.
- In considering a non-conviction sentence such as a conditional discharge, determine whether your client expects to travel to other countries. Consult with an immigration lawyer from the relevant country to determine inadmissibility based on that country's laws.
- Consider obtaining a written opinion from an immigration lawyer on potential immigration consequences to assist with any pre-trial resolution discussions or sentencing.
- Note that outcomes that will not result in inadmissibility include:
 - Peace bond (both common law peace bonds and section 810 peace bonds)
 - Discharge (absolute or conditional)
- Suspended sentence is treated as a conviction, no different for immigration purposes than other sentences under six months.
- Outcomes that will result in inadmissibility include:
 - A conviction for any offence carrying a ten year maximum punishment
 - A custodial sentence (or conditional sentence (see previous comments)) of six months or more
 - A plea or an agreed statement of facts that could link an accused to a 'gang' or a criminal organization under section 37 of the *IRPA*, or in an admission under section 36(2)(d). The same is true for section 34, 35, 40 or any admission to an offence under the *IRPA*.

REGISTRIES, RECORDS, PARDONS



REGISTRIES, RECORDS, PARDONS

YOUR CLIENT ASKS:

What happens if I don't pay a victim surcharge or court ordered fine after I'm sentenced?

A. Victim Surcharges

In 2013, Bill C-37¹⁸ came into force, and applies to all offences committed since then. It brought significant changes to victim surcharges (surcharge), and modified the previous system in important ways. Base surcharge amounts were doubled. If a fine is imposed, the surcharge normally amounts to an additional 30% of that fine; if no fine is imposed, the amount will normally be a flat \$100 for each summary offence and \$200 for each indictable offence.¹⁹

The sentencing judge can increase the percentage or amount of the surcharge, if considered appropriate. While judges retain power to increase the surcharge, they cannot exempt the offender from payment by waiving it. Some judicial discretion remains at the enforcement stage, as the court cannot issue a warrant of committal until inquiring (a) if other enforcement mechanisms may be successful, and (b) whether the default has been wilful.

In *R. v. Michael*,²⁰ Justice Paciocco held that imposing a \$900 surcharge on an alcohol and drug addicted homeless person would be cruel and unusual punishment, contravening section 12 of the *Charter*. Following that decision, some understood that every case where such relief is sought must be accompanied by an application for *Charter* relief. In *R. v. Sharkey*,²¹ Justice Paciocco clarified that step was unnecessary if the judge finds that imposing the surcharge would offend section 12, based on the facts of the particular case.²²

Though the *Code* distinguishes surcharges from fines,²³ section 737(9) directs that the same regime for investigating and enforcing wilful non-payment of fines applies to non-payment of surcharges. This means that an offender who fails to pay any or all of a surcharge may be incarcerated.²⁴ However, before proceeding to that stage, the sentencing court must consider whether “the mechanisms provided in sections 734.5 and 734.6 are not appropriate in the circumstances”.²⁵ For fines, those provisions direct that if an offender defaults, a government may also refuse to ‘do business’ with the defaulter to encourage payment, for example by suspending or refusing to renew a licence, permit or another government document. Even if satisfied that these mechanisms have been tried and failed, the court must also be satisfied “that the offender has, without reasonable excuse, refused to pay”.²⁶ Unless the failure to pay is wilful,

¹⁸ S.C. 2013 c. 11.

¹⁹ Note that at the time of publication, Bill C-28 had been tabled, which again proposes changes to the victim fine surcharge.

²⁰ 2014 ONCJ 360.

²¹ *R. v. Sharkey* (2014) ONCJ 437.

²² These decisions are further complicated by the question as to whether a provincially appointed judge, who, ‘being a creature of statute’ lacks ‘inherent jurisdiction’ to grant a declaration of invalidity.

²³ See *R. v. Crowell* (1992), N.S.J. No. 380 (N.S.C.A.).

²⁴ Sections 734(3)-(7).

²⁵ Section 734.7(1)(b)(i).

²⁶ Sections 734.7(1)(b)(ii) and 737(9).

a term of imprisonment in default may not be imposed.²⁷

In provinces and territories with a section 736 ‘fine option program’ for *Code* offences, amounts owing for non-payment of surcharges may be ‘worked off’ through participation in those programs. However, not all regions have such programs.²⁸ Further, an offender’s application for what is now called a record suspension (formerly a pardon) will not be considered until all surcharges have been paid.²⁹

This is critical, and often overlooked. Consider offenders who apply for a record suspension many years after conviction (five years for summary matters and ten for indictable matters), but then learn that they remain ineligible until the surcharge is fully paid. As the sentence will not expire until all fines are fully paid, the five or ten year clock does not start running until that time.

Youths

Unless an adult sentence is imposed, section 50 of the *YCJA* says that section 737 of the *Criminal Code* does not apply to young offenders. However, section 53(1) of the *YCJA* creates a surcharge program applicable to youth. Section 53(2) of the *YCJA* permits a youth justice court that imposes a fine to order a young offender to pay a surcharge not exceeding 15% of the fine.

Counsel Considerations

- For offences on or after October 24, 2013, victim surcharges cannot be waived by the sentencing judge. Check whether your client has the option of ‘working off’ the surcharge in your region. Otherwise, your client can expect to pay \$100 for each offence prosecuted summarily and \$200 for each offence prosecuted by indictment.
- Tell your client there can be no pardon/record suspension if the victim surcharge is outstanding. Remember that the waiting period (five or ten years) does not start running until all fines and surcharges are paid.
- If a fine is imposed, the victim surcharge will be 30% of that fine. But for impoverished offenders, it may be appropriate to ask the sentencing judge to make the fine as low as \$1.
- Fines are unavailable if the judge imposes an absolute or conditional discharge – the full \$100 /\$200 must then be paid.
- Check your provincial or territorial legislation to see how long the judge can allow to pay the victim surcharge.

B. Unpaid Court-Ordered Fines

Sentencing judges must inquire about an offender’s ability to pay any fine before imposing a sentence that includes a fine,³⁰ and the offender must be given a reasonable time to pay.³¹

²⁷ [2003] S.C.J. No. 78.

²⁸ British Columbia, Ontario and Newfoundland do not presently have fine option programs for *Code* offences.

²⁹ Parole Board of Canada *Record Suspension Guide* at 3.

³⁰ See section 734.

³¹ This flows from the notion that if the sentencing judge has decided that a fine is appropriate, normally the judge has dismissed imprison-

An offender who defaults can be jailed for non-payment,³² but several steps must be taken first. First, when the fine is imposed, the offender must be told about the possibility of applying for an extension of time to pay.³³ An extension is usually requested informally, by the offender filling out a form specifying the reason for non-payment and the additional time requested.³⁴ The form is submitted to the judge in Chambers, without requiring a court hearing.

If any part of the fine remains outstanding, the court³⁵ must next examine whether “the mechanisms provided in section 734.5 and 734.6 are not appropriate in the circumstances.”³⁶ As mentioned in the discussion of victim surcharges above, a government may refuse to issue or renew or may suspend a licence, permit or other instrument [issued by that legislative body] until the fine has been paid. Judges considering incarceration for non-payment must first investigate whether the inconvenience imposed through these measures has been tried and failed.

Another consideration before exploring incarceration for non-payment is that the Crown may register the amount of the unpaid fine as a civil judgment and proceed to enforce the judgment “in the same manner as if it were a judgment obtained...in civil proceedings.”³⁷

The court must ultimately be satisfied that these mechanisms have been tried and failed, and “that the offender has, without reasonable excuse, refused to pay the fine”³⁸ before moving to incarceration for non-payment. The amount of time imposed will be calculated as specified in section 734(5) of the *Code*. While sometimes complicated to compute, the formula is based on the concept of dividing the unpaid fine and related costs by the applicable minimum wage for an eight-hour workday.

Again, some offenders unable to pay may discharge the fine by earning credits in a ‘fine option program’ under section 736 of the *Code*, and section 734.2(1) requires that the offender be told of this possibility when the fine is imposed.³⁹ However, not all provinces and territories have those programs for *Code* offences,⁴⁰ though some have fine option programs for provincial or territorial offences. Check the type of charge and the rules in your jurisdiction, as different regions have different mechanisms for collecting fines.

Youths

If a young person has not paid a fine imposed, the *YCJA* is clear that *Code* provisions do not apply to youthful

ment as an appropriate response to the offender's criminality.

³² Sections 734(3)-(7).

³³ Section 742.2(1)(c).

³⁴ Section 734.3. The court may not change the amount of the fine.

³⁵ In most of the country, this process has been delegated to Justices of the Peace.

³⁶ Section 734.7(1)(b)(i).

³⁷ Section 734.6.

³⁸ Sections 734.7(1)(b)(ii) and 737(9). Though enacted before the Supreme Court of Canada's important constitutional decision in *R. v. Wu*, [2003] 3 SCR 530, the legislation is entirely consistent with this decision, which holds that unless there is evidence that the failure to pay a fine is willful, a term of imprisonment in default may not be imposed. See also discussion *infra* at 16-17.

³⁹ Procedures exist in most courthouses for the offender to be given a ‘fine order’ on the day the fine is imposed, containing details of where and when to make payment of the fine, and, where available, the opportunity of applying to a ‘fine order program’.

⁴⁰ *Supra* note 28.

defaulters. A sentence review could be held and the reviewing court could extend the time for paying the fine, up to 12 months subsequent to the end of the original sentence.⁴¹ Section 54(2) of the *YCJA* permits a young person to discharge the fine or surcharge by earning credits for work performed, much like section 736 of the *Code*.

Counsel Considerations

- Remember that on sentencing and imposing a fine, the judge must:
 - Inquire about ability to pay any fine
 - Provide reasonable time to pay
 - Notify the offender that applying for an extension is an option
 - Notify the offender of any possibility of paying off the fine by earning credits through a fine option program (operating only in some jurisdictions).
- Be prepared to address these issues with your sentencing submissions.
- Carefully review ability to pay a fine with your client. It may sometimes be preferable for the client to propose some community service in lieu of payment of a (non-mandatory) fine.
- If a fine is unpaid, the judge will then assess whether other options have been adequately explored (e.g. refusing to renew or restrict licenses, permits, or enforcing the fine civilly). Before a client may be incarcerated for non-payment, a hearing will be held to establish that the failure to pay the fine is willful.

C. Non-Payment of Court-Ordered Restitution

YOUR CLIENT ASKS:

The judge ordered me to pay money for the victim or something – what if I don't?

There are two forms of restitution orders:⁴² an optional condition of an order of probation, many with detailed payment schedules attached; or a freestanding order under section 738 of the *Code*. As previously discussed, although courts generally take the offender's ability to pay into consideration in making an order, the offender's future prospects and ability to pay is not always the dominant consideration.

For either of these options, if the determined amount is not paid immediately, the victim may seek enforcement through the civil courts. Enforcement mechanisms for civil debts vary across the country, but generally provide that the debtor can be brought before a court official to have assets and liabilities scrutinized under oath, that the debtor's wages and other assets can be garnisheed or seized, and that these enforcement mechanisms can continue long after the original sentence has been completed.

If the probation order requires money to be paid, the client can be charged with breach of probation for failure to comply if the probation officer sees the breach as willful. If the trial judge decides the offence has been made out, the

⁴¹ Section 59(9) *YCJA*.

⁴² Detailed descriptions of circumstances in which restitution can (and cannot) be ordered and some of the legal and constitutional issues that have arisen or might arise can be found in Canadian sentencing texts. See, for example, C. Ruby, G. Chan & N. Hasan, *Sentencing* (8th ed.) (Toronto: LexisNexis, 2012) at 696-691; A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 251-255; T.W. Ferris, *Sentencing: Practical Approaches* (Toronto: LexisNexis, 2005) at 242-246.

client could be fined, jailed and/or placed on a further period of probation – which would likely have a continued order for payment attached as an optional condition. If the debt is found in a stand-alone order, the judgment holder may be able to use that order to collect the money.

Again, the waiting period for a record suspension (formerly pardon) will not begin to run until the restitution has been fully paid, even if the individual has complied with all requirements for granting a record suspension.⁴³ And again, once restitution is paid, the waiting period will be either five or ten years.

Youths

The *YCJA* excludes youths from having a freestanding restitution order made against them. However, sections 42(2) (e)-(h) mirror much of the wording in section 738 of the *Code*, suggesting that restitution orders can and should be made part of youth sentence orders (or as optional probationary conditions). Given the *YCJA*'s emphasis on rehabilitating young offenders, sentencing judges should pay considerable attention to the youth's ability to make payment.⁴⁴ A sentence review under the *YCJA* may be held where a young person has difficulty complying with a restitution or compensation order, and such a review can provide an additional 12 months for payment, after the initial order ends.

Counsel Considerations

- A sentencing judge must consider the offender's ability to pay restitution before imposing it (though the judge is not as limited as when making court orders to pay fines). Be prepared to address this issue as part of sentencing submissions.
- Carefully review the actual ability to pay restitution with your client, particularly if payment is part of a probation or conditional sentence order. In some cases it may be preferable to perform some community service in lieu of payment of restitution.
- Before an offender may be incarcerated for non-payment of restitution, there must be a hearing before a judicial officer to establish that the offender's failure to pay restitution is willful.
- No pardon or record suspension may be granted until the offender has paid off all restitution owing, and the waiting period will only begin to run at that point.

D. DNA Orders

YOUR CLIENT ASKS:

Will the judge order me to provide a DNA sample if I'm convicted? If I have to provide a sample, do I have any options as to how? What if I refuse?

Canada's *DNA Identification Act* came into force in 2000⁴⁵ and has been amended several times since.⁴⁶ DNA samples

⁴³ Parole Board of Canada, *Record Suspension Application Guide* at 1.

⁴⁴ Section 54(1) directs the youth justice court to have regard to the present and future means of the young person to pay in making a restitution or compensation order.

⁴⁵ S.C. 1998, c.37.

⁴⁶ S.C. 2005, c.25, as amended by S.C. 2007, c.22, section 47.

may be taken at various stages in the investigative and sentencing process, under certain circumstances.⁴⁷

The legislation is based on two types of ‘primary designated offences’. The first includes serious offences such as murder, manslaughter, aggravated assault and aggravated sexual assault,⁴⁸ where the judge *must* make an order for a DNA sample upon conviction.⁴⁹ The second category includes more common offences, such as sexual assault and various child pornography offences.⁵⁰ The sentencing judge in those cases has limited discretion *not* to make a DNA order, if satisfied that the impact on the privacy and security of the offender would be grossly disproportionate to the public interest in protecting society and seeing to the proper administration of justice.⁵¹

For ‘secondary designated offences’,⁵² the prosecutor needs to apply for the order. The judge may then make a DNA order if “satisfied that it is in the best interests of the administration of justice to do so”. Section 487.051(3) lists criteria for the judge to consider and balance,⁵³ and the judge must give reasons for the decision either way.

Failing to comply with a DNA order may result in a charge and additional sentence.⁵⁴ An order may be made on the actual sentencing date, but the court has up to 90 days after the sentence is imposed to make it. When the judge makes the order, the offender is directed to appear at a certain place and time to provide samples.⁵⁵ Most courthouses have facilities and trained personnel to take samples within hours of an order.

Before taking samples, the designated officer must determine if the offender’s DNA profile is already in the national DNA databank. If it is, the officer may not take a further sample.⁵⁶ The standard method is to prick the skin and take a small blood sample, but to accommodate religious, cultural or medical objections, alternatives are provided in section 487.06(1).

Once collected – and there are complex rules about the format in which databank ‘profiles’ are to be stored – the information may be shared with Canadian and international law enforcement officials and other law enforcement databanks.

⁴⁷ One of those circumstances is where a person was found guilty of an offence prior to the coming into force of the first version of the legislation. Since such applications are now rare, this subject has been omitted.

⁴⁸ Section 487.04(a).

⁴⁹ Though a discharge is unlikely to be imposed (for those offences in this category for which a discharge is even available), note that the registration of a conviction is not a condition precedent to making an order for taking a DNA sample.

⁵⁰ Section 487.04(a.1)-(d).

⁵¹ Section 487.051(2).

⁵² These now include such offences as indecent acts, criminal harassment, uttering threats and assault, as well as some drug offences and other unspecified offences where the maximum potential penalty (if prosecuted by indictment) is five years or more. See section 487.051(3).

⁵³ Several appellate courts have followed the lead of the Ontario Court of Appeal in *R. v. Hendry*, [2001] O.J. No. 584, where the court held “in the vast majority of cases it would be in the best interest of the administration of justice” to make a DNA order.

⁵⁴ Section 487.0552(1).

⁵⁵ Section 487.051(4).

⁵⁶ Section 487.071(1)-(3).

Youths

The Supreme Court of Canada has ruled that ordering a DNA sample from a 13 year-old who stabbed his mother with a pen was inappropriate.⁵⁷ However, a subsequent decision of the Ontario Court of Appeal⁵⁸ suggests no distinction between young people and adults for making a DNA order.

Counsel Consideration

- Check the *Criminal Code* to determine whether the offence(s) is a primary or secondary offence (may depend on how Crown elects to proceed). Consider whether arguing the issue is worthwhile, depending on the election and the designation of the offence.

E. Pardons and Record Suspensions

YOUR CLIENT ASKS:

How long do I have to wait to get rid of my record? Are some sentences automatically pardoned without me doing anything else?

I thought I was free and clear! What if I'm charged or convicted again? Can my pardon or record suspension be mentioned in court, and how can it be used against me? Isn't a pardon or record suspension good forever?

Pardons are no longer available under the *Criminal Records Act (CRA)*, the legislation most commonly used to clear an offender's name, and have been replaced with record suspensions.⁵⁹ However, those who applied before the legislation changed in 2013 and whose applications have not yet been processed may still be eligible for a pardon. Administrative pardons, now called record suspensions, are the most common form of pardon today.

In addition to pardons and record suspensions, there is also the rarely used Royal Prerogative of Mercy.⁶⁰ 'Royal pardons', 'free pardons' and 'conditional pardons' are described in various sections of the *Code* (particularly section 745). These are exceptional powers and generally used when Cabinet or the Parole Board of Canada considers that the individual should never have been convicted of the offence.

⁵⁷ *R. v. R.C.*, [2005] 3 S.C.R. 99, 2005 SCC 61.

⁵⁸ [2011] O.J. No. 1447.

⁵⁹ In 2010, Bill C-23A provided that an offender must wait longer before applying for a pardon for a 'serious crime'. These measures received Royal Assent later in 2010 and took effect immediately, directing that applications received on or after that date were to be disposed of under the new measures. The second part of the Bill (originally Bill C-23B), was enacted as part of omnibus criminal legislation (Bill C-10) and proclaimed in force on March 23, 2012. These amendments replaced the term 'pardon' with 'record suspension,' the waiting period increased from five to ten years after completion of a sentence for an indictable offence and from three to five years after completion of a sentence for a summary offence, and individuals convicted of sexual offences against minors (with certain exceptions) and those convicted of more than three indictable offences, each with a sentence of two or more years, are ineligible for a record suspension.

⁶⁰ See discussions in D. Cole & A. Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990) at 399-415; C. Ruby, G. Chan & N. Hasan, *Sentencing* (8th ed.) (Toronto: LexisNexis Canada, 2012) at 386-392.

YOUR CLIENT ASKS:

What can I say about a past conviction in subsequent proceedings, if a pardon or record suspension has been granted?

In *Re Therrien*,⁶¹ the Supreme Court of Canada clarified that pardons do not mean that the offender did not commit the crime but rather that the offender has been rehabilitated to the extent that the future consequences of conviction can be minimized by applying post-conviction remedial legislation.⁶²

This distinction is important. For example, there is a common misconception that border authorities in other countries are bound by a Canadian pardon, but the *Canada Gazette* recently clarified the process:

A pardon allows people who were convicted of a criminal offence, but who have completed their sentence and demonstrated that they are law-abiding citizens for a prescribed number of years, to have their judicial record kept separate and apart from other criminal records so that it no longer reflects adversely on them. A pardon removes any disqualification under federal legislation resulting from the conviction. A pardon does not erase the fact that a person was convicted of an offence. *For example, a pardon does not guarantee entry into, or visa privileges from another country.*⁶³ (emphasis added)

YOUR CLIENT ASKS:

When will I be eligible for a pardon or record suspension?

Significant changes to the *CRA* in 2010 and 2013 mean that ineligibility periods for record suspensions are now longer than they were for pardons under the previous regime. Waiting or ineligibility periods for a record suspension are now five years for summary conviction offences, and ten years for indictable offences.⁶⁴ For some offences, the possibility of a pardon or record suspension was eliminated completely, specifically for those convicted of:

- a sexual offence to a minor, unless they can show (a) that they were not in a position of trust or authority towards the victim, (b) they did not use or threaten to use violence, and (c) they were less than five years older than the victim.
- more than three offences – if each was prosecuted by indictment or is a serious offence subject to a maximum punishment of imprisonment for life, and for each charge the person was sentenced to imprisonment for two years or more.⁶⁵

⁶¹ [2001] S.C.J. No. 36.

⁶² See, paras. 114-116 (S.C.C.).

⁶³ SOR/2012-12, February 8, 2012. *Order Amending the Pardon Services Fees Order: Executive Summary*. Available at [Canada Gazette](http://Canada.Gazette/www.gazette.gc.ca/rp-pr/p2/2012/2012-02-29/html/sor-dors12-eng.html) (www.gazette.gc.ca/rp-pr/p2/2012/2012-02-29/html/sor-dors12-eng.html).

⁶⁴ See *infra* at 13 on the impact of unpaid fines on these waiting periods.

⁶⁵ Even if precluded from applying for a 'record suspension' under the *CRA*, presumably people in either of these groups could still apply to the federal Cabinet for a pardon under the *Code*.

YOUR CLIENT ASKS:

What if I received a discharge?

If your client received an absolute or conditional discharge for a non-sexual offence, on or after July 24, 1992, CRA says that records will be removed from the Canadian Police Information Centre (CPIC) computer system one year (for an absolute discharge) or three years (for a conditional discharge) after the discharge period expires.

YOUR CLIENT ASKS:

Is my pardon or record suspension reviewable?

Once granted, neither a pardon nor record suspension is irrevocable.⁶⁶ If the Parole Board of Canada learns that relevant information was not disclosed at the time of the application, or that the offender is no longer of good character, a record suspension may be revoked. The Parole Board may also revoke a pardon or record suspension if the offender is subsequently convicted of a summary conviction offence (under a federal statute) and will automatically revoke it (or deem it not to be in effect) if the offender is subsequently convicted of an indictable or hybrid offence.

In those cases, records of the offences for which the offender was pardoned (or for whom the record was suspended) are again kept with other conviction records and comprise part of the offender's criminal record.

YOUR CLIENT ASKS:

Can a pardon be used against me in subsequent proceedings?

The Quebec Court of Appeal⁶⁷ and the Ontario Court of Justice⁶⁸ have held that, since section 7.2 of the CRA automatically vacates a pardon with the conviction for which sentence is about to be imposed, the prior conviction could be considered in sentencing for the new offence, although formal revocation has not yet occurred. However, in *R. v. B. (H.)*,⁶⁹ the New Brunswick Court of Queen's Bench took a different approach and held that a prior conviction could not automatically become an aggravating factor, because the relevant time for consideration was the offender's status on the date of the offence, not on the date of sentencing. The sentencing court could only use the prior conviction to consider the offender's character and prospects for rehabilitation.

Record Suspensions and Admissibility to Canada

An individual found to be inadmissible for criminality as a result of a criminal conviction in Canada may also apply to the Parole Board of Canada for a record suspension under the CRA:

- ten years after the completion of a sentence served for an indictable offence;

⁶⁶ The federal Minister of Public Safety and Emergency Preparedness has power under section 6(3) of the CRA to approve disclosure to a court of a criminal record still under suspension. See *R. v. Zeller*, [1998] A.J. No. 351.

⁶⁷ *R. v. Poupart*, [2010] Q.J. No. 11080, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 496 (S.C.C.).

⁶⁸ *R. v. Sharman*, [2011] O.J. No. 922 at para. 4.

⁶⁹ [2011] N.B.J. No. 391 (N.B.Q.B.).

- five years after the completion of a sentence served for a summary offence.⁷⁰

Individuals criminally inadmissible to Canada as a result of foreign convictions are ineligible to apply for a record suspension and must instead apply for rehabilitation.

For individuals with both Canadian and foreign convictions, a record suspension must be secured first and then an application made for rehabilitation to eliminate inadmissibility.

Youths

Pardons and record suspensions under *CRA* do not apply to youths,⁷¹ as these issues are covered by various sections of the *YCJA*. Access to youth records is:

- restricted to a select list of persons or classes of persons without a court order; and
- time limited, if the young person avoids further criminal involvement. Once the ‘access period’ has elapsed, “no record...may be used for any purpose that would identify the young person to whom the record relates”.⁷²

There are three main exceptions.

1. If an adult sentence has been imposed on a young person.
2. If the young person continues to re-offend during the ‘access period(s)’, the record remains open and may be referred to in subsequent proceedings. This explains why some young persons’ records continue to be included as part of their criminal record even when they have reached adulthood.⁷³
3. The *YCJA* permits an applicant to obtain access to a youth record after the expiration of the access period if a fairly stringent test is met.⁷⁴

⁷⁰ In addition to other eligibility requirements, record suspensions are limited to individuals who have not been charged or convicted of any additional offences within the five or ten year period.

⁷¹ Section 3 of the *CRA* refers to a person who has been ‘convicted’ of an offence. Young persons are not ‘convicted’ unless an adult sentence is imposed.

⁷² *YCJA* section 128(1). Section 128(4) directs the Commissioner of the RCMP to purge most youth records “at the end of the applicable period”.

⁷³ Section 119(9) of the *YCJA* operates to convert a youth record into an adult record if the defendant obtains an adult conviction within the period of access to the youth finding of guilt.

⁷⁴ Note that some police services have taken the position that the youth has access to a record during the access period. If the youth asks for a record check, the youth record is disclosed (to the youth, but through youth’s employers, volunteer organizations, etc.). Once access has been given to the youth, a variety of provisions control subsequent publication and disclosure. It is an ongoing point of discussion whether the youth commits an offence by subsequently disclosing this record to an individual/entity that does not have access.

Counsel Considerations

- Advise the client that the current fee for processing an application for record suspension is \$631. (See the Parole Board of Canada⁷⁵ website for its Record Suspension Guide, including downloadable forms. Consider section 14 of the Parole Board’s Policy Manual (also available on the web)⁷⁶ when applying).
- Pay careful attention to the form of court order to determine what provisions apply. There are differences between discharges and convictions.
- Advise the client in writing of how long they must wait before applying for a pardon or record suspension.
- Advise that things may change if the client is later found guilty of other offences. In some cases a previously granted pardon or record suspension will be automatically vacated upon a subsequent finding of guilt.
- Advise your client that a Canadian pardon or record suspension does not bind other countries, which retain the right to decide whether or not to admit a Canadian – even as a tourist – if previously found guilty of a criminal offence.
- Consider a record suspension for your client previously found inadmissible to Canada for criminality.

F. Photographs and Fingerprints

YOUR CLIENT ASKS:

What will happen to my fingerprints and photos taken by police after I was arrested?

What will happen to the materials that the police prepared for court?

I was acquitted – will any of this come up when I apply for a job or to volunteer?

For most offences, an accused must submit to being photographed and fingerprinted by the police under the *Identification of Criminals Act* and the police are authorized to share the prints or photos “for the purpose of affording information to officers and others engaged in the execution or administration of justice” (section 2(3)). If the criminal charge is withdrawn or stayed, or the accused is found not guilty, photographs and fingerprints are *not* automatically destroyed. Each police force has its own policies and procedures, and counsel need to determine what will apply in the situation. One force’s destruction of materials will not necessarily mean other forces or governments with which records have lawfully been shared will also destroy those materials. Requests for RCMP record destruction are forwarded by local police services after the local service has determined that a record should be destroyed. The RCMP has its own policies, though, about when to approve or deny these requests.

Other reports generated as a result of the charge(s) will not be destroyed even if photographs and fingerprints are destroyed by the relevant police force. Hard copies of officers’ notes, occurrence reports or records of arrest will remain in the possession of that force, and may be used in subsequent proceedings. Case law to date has generally held that non-conviction dispositions, including references to discharges, peace bonds, restraining orders, withdrawn

⁷⁵ Available at [Parole Board of Canada](http://www.pbc-clcc.gc.ca) (www.pbc-clcc.gc.ca).

⁷⁶ Available at [Parole Board of Canada](http://www.canada.ca/en/parole-board/corporate/publications-and-forms/decision-making-policy-manual-for-board-members.html) (www.canada.ca/en/parole-board/corporate/publications-and-forms/decision-making-policy-manual-for-board-members.html).

and diverted criminal charges and even attempted suicides, can be included in the Criminal Information Requests (CIRs) produced by police in response to Vulnerable Sector checks brought by employers or volunteer agencies.

Youths

Despite the emphasis on protecting the privacy of youths in various sections of the *YCJA*, section 113 allows police to take and use photographs and fingerprints of youth in the same way as for adults.

Normally, the police cannot release photographs of young people (accused or victims), other than to other law enforcement authorities. However, section 110(4) of the *YCJA* authorizes the police to apply to a youth court judge for permission to publish the name and photograph of a young person as having committed or allegedly committed an indictable offence “if the court is satisfied that the publication would not be contrary to the young person’s best interest or the public interest”. Section 111 generally prohibits the publication of identifying information of a child or young person who is a victim or witness of an offence committed by another young person, with certain explicit exceptions. (However, see earlier comments about release of criminal record check products to youths, and so then to employers, volunteer organizations and others.)

Counsel Considerations

- Do not assume that fingerprints and photographs will be automatically destroyed even if charges were withdrawn or your client was acquitted. Most police forces require the accused to apply before such materials will be destroyed. Check with the police force that took the client’s fingerprints and photographs for that force’s policies, procedures and costs.
- Police files are not destroyed when a pardon is granted, and certain background checks may result in past investigations becoming disclosed.
- It is not safe to assume that a Crown election to ultimately proceed summarily will make a difference. Also, do not assume that young people are in a different position from adults in this regard.

G. Sex Offender Registries

YOUR CLIENT ASKS:

The judge ordered me to register as a sex offender. What if I don't?

Can the judge restrict my movements or activities as part of the sentence, even if I'm not on the registry?

In 2001, Ontario enacted Canada’s first sex offender registry. Though it has largely been superseded by the 2004 National Sex Offender Registry, Ontario’s law is still in place, and places additional obligations on sex offenders to report personal details and residences to police authorities.⁷⁷ Other jurisdictions have centralized disclosure of sex offender information, some available to the public.⁷⁸

⁷⁷ Attention should be paid to the differences between the provincial or territorial, and federal statutes. A useful review of the legislation is contained in L. Murphy, J.P. Fedoroff & M. Martineau, “Canada’s sex offender registries: Background, implementation and social policy considerations”, (2009) 18 1-2 *The Canadian Journal of Human Sexuality* at 61-72.

⁷⁸ For example, see [Alberta’s ‘high risk offender’ website](http://www.solgps.alberta.ca/safe_communities/community_awareness/serious_violent_) (www.solgps.alberta.ca/safe_communities/community_awareness/serious_violent_

The national *Sex Offender Information Registration Act*⁷⁹ (*SOIRA*) came into force in December 2004. When an adult offender is convicted⁸⁰ of either a designated sexual offence,⁸¹ a non-sexual offence committed with the intent to commit a designated sexual offence,⁸² or certain historical sexual offences,⁸³ the Crown can apply to the sentencing judge for an order requiring the offender to provide various types of personal information to the Sex Offender Information Registry. Courts examining the constitutionality of these provisions have consistently held that the sentencing judge should normally grant the application unless the offender establishes that the effect of registration on the offender would be grossly disproportionate to the public interest in protecting society by registering sex offenders.

Once the order is made, the offender must:

- report to a registration centre – local police department – within 15 days of the making of the order, or 15 days from release from custody.
- not leave Canada until reporting to authorities.
- comply with *SOIRA* by providing full name (and any aliases used), date of birth, gender, address and telephone number of main and secondary residence, employment address (or if enrolled in an educational institution, that address), and height, weight and distinguishing marks such as tattoos. The interviewing police officer is authorized to require the offender to be photographed.
- provide updates of any change of name or residence within seven days, and the offender must update all information, in person, annually.

Failure to provide any of the required information is punishable by summary conviction, with a fine of up to \$10,000, up to six months' imprisonment, or both. Providing false or misleading information is also an offence.⁸⁴ Subsequent offences may be prosecuted either by indictment or summarily, at the election of the Crown prosecutor. An offender may be subject to a *SOIRA* order for ten years, 20 years or life, depending on the nature of the relevant offence. The offender may apply for an exemption or a variation in the reporting requirements if the impact on the offender or on society would be grossly disproportionate. The offender can also apply to terminate an order.

The police are authorized to share the information with other police officers and prosecutorial authorities, but there are restrictions on how material in a police database may be 'consulted, disclosed and used'. Unlike many U.S. jurisdictions, the legislation is clear that police are prohibited from making public disclosure of the whereabouts of those subject to *SOIRA* orders.⁸⁵

Section 161 of the *Code* provides that if the offender is discharged or convicted of (principally) sexual offences against

offenders/Pages/default.aspx).

⁷⁹ S.C. 2004, c. 10.

⁸⁰ If the court decides to impose either an absolute or a conditional discharge, the legislation will not apply. See, for example, *R. v. Troutlake* (2002), 56 W.C.B. (2d) 100 (Ont. C.J.).

⁸¹ *Code* section 490.011(a).

⁸² *Code* section 490.011(b).

⁸³ *Code* section 490.011 (c) and (d). The legislation also contains provisions so people convicted of attempts or conspiracies to commit sexual offences are liable to be registered.

⁸⁴ Section 490.031.

⁸⁵ But, see footnote 78, which seems to contradict this point.

children, the court may, in addition to any other penalty, make an order prohibiting the offender from:

- attending a public park, swimming area, day care centre, school ground, playground or community centre where children are or might reasonably be expected to be;
- seeking, obtaining or continuing (paid or volunteer) employment that involves being in a position of trust or authority towards children;
- having any contact or communication with a child unless under the supervision of a person the court considers appropriate; and
- using the Internet or other digital network, unless the offender does so under conditions set by the court.

These prohibitions may be for life or a shorter period set by the court. The prohibition period set by the court commences when the offender is released from a period of custody imposed. Either the Crown or the offender may move to vary the conditions in light of ‘changed circumstances’.

Youths

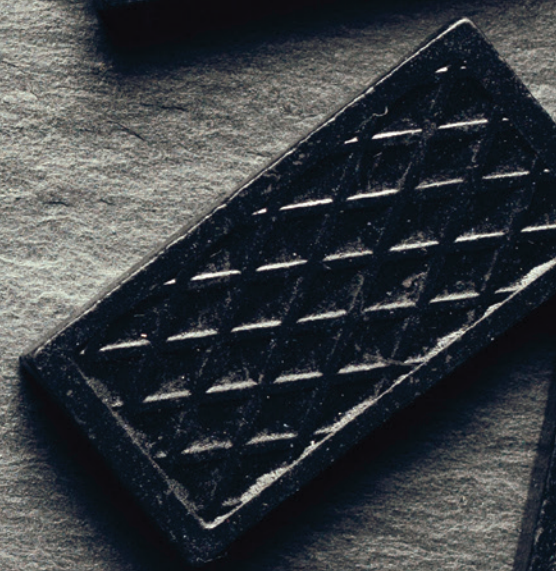
Young persons sentenced to youth sentences under the *YCJA* are excluded from the *SOIRA* provisions, section 161 orders and Ontario’s law.⁸⁶ Only if a young person is sentenced as an adult can these regimes apply.

Counsel Considerations

- Check how long your client will be subject to the designation.
- Make sure your client understands their reporting obligations under the designation. Consider whether a section 161 order accompanies the designation.
- Discuss with your client if it will be necessary to seek any exceptions to blanket prohibitions.

⁸⁶ *YCJA* section 50 and *Criminal Code* section 490.012(2)(a); also, “*Christopher’s Law*” section 8(2) (Ontario).

CIVIL DISABILITIES



CIVIL DISABILITIES

YOUR CLIENT ASKS:

What else is going to happen to me?

A person convicted of a criminal offence may face restrictions or limitations on civil privileges such as jury service, drivers' licences, possession of firearms, voting rights and service in the Canadian Armed Forces. This section touches on some of these potential restrictions. In addition, refer to Other Resources for potentially relevant sections of provincial or territorial legislation.

A. Jury Service

Depending on your jurisdiction, people may be disqualified from serving on a jury if they have been convicted of certain criminal offences.

Alberta

Section 4(h) of the *Jury Act* disqualifies people convicted of a criminal offence (if no pardon has been granted for that offence), and people currently charged with a criminal offence.

British Columbia

Section 3(1)(p) of the *Jury Act* says a person is disqualified from serving as a juror if convicted of an offence under the *Criminal Code* or the *CDSA*, if a record suspension has not been granted under the *CRA* or sub-section (q), or is currently charged with a *Criminal Code* or *CDSA* offence.

Manitoba

Section 3 of the *Jury Act* says that among those disqualified from jury duty are:

- (p) a person convicted of an indictable offence, unless he or she has been pardoned; or
- (q) a person convicted within the previous five years of an offence for which the punishment could be a fine of \$5,000 or more or imprisonment for one year or more, unless he or she has been pardoned; or
- (r) a person charged within the previous two years with an offence for which the punishment could be a fine of \$5,000 or more or imprisonment for one year or more where the person has not been acquitted, the charge has not been dismissed or withdrawn and a stay of proceedings has not been entered in respect of the trial for the offence.

New Brunswick

Section 3(r) of the *Jury Act* disqualifies from serving on a jury people convicted of an offence under the *Criminal Code*, the *Food and Drugs Act* or the *Narcotic Control Act*, unless they have obtained a pardon.

Newfoundland and Labrador

Section 5(m) of the *Jury Act* states that a person charged with an indictable offence is ineligible for jury duty, and subsection (n) disqualifies a person who “has within five years of the taking of the jury list, unless sooner pardoned, served a period of imprisonment or other detention for an indictable offence without the option of a fine.”

Nova Scotia

Section 4(e) of the *Juries Act* states that anyone convicted of a criminal offence for which they were sentenced to two or more years of imprisonment is disqualified from jury service.

Prince Edward Island

Section 5(i) of the *Jury Act* excludes anyone convicted of an offence for which the punishment could have been a fine of \$3,000 or more, or a sentence of imprisonment exceeding twelve months, unless pardoned, within the previous five years.

Quebec

Section 4(j) of the *Jurors Act* disentitles a person charged with or convicted of a criminal act from jury service.

Ontario

Section 4(b) of the *Juries Act* says that people are ineligible to serve as a juror if they have “been convicted of an offence that may be prosecuted by indictment, unless subsequently granted a pardon.”

Saskatchewan

The *Jury Act* does not expressly disentitle those with a criminal record from serving as a juror but section 6(h) disqualifies those legally confined in an institution.

Yukon

Section 5(a) of the *Jury Act* says people are not qualified to serve as jurors if they “(a) have been convicted of an offence against an Act of Parliament for which a term of imprisonment exceeding 12 months was imposed and who have not been pardoned by the government of Canada for this offence.”

Northwest Territories

Section 5(a) of the *Jury Act* disqualifies a person to serve as a juror if they have been convicted of an offence and sentenced to a term of imprisonment exceeding one year, not having been subsequently granted a free pardon.

Nunavut

Under section 4 of the *Jury Act*, a person is disqualified if sentenced to a term of imprisonment of more than one year.

B. Possessing Firearms

Having a criminal record does not automatically bar a person from obtaining a firearms licence. Section 5 of the *Firearms Act* frames the test for eligibility to hold a licence in terms of public safety. It says that no one should be licenced if not in the interests of public safety that the person have access to firearms, and section 5(2) sets out factors requiring particular attention in that analysis. Certain specific criminal offences are also referenced:

In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have to consider whether the person, within the previous five years,

- (a) has been convicted or discharged under section 730 of the *Criminal Code* of
 - (i) an offence in the commission of which violence against another person was used, threatened or attempted,
 - (ii) an offence under this Act or Part III of the *Criminal Code*,
 - (iii) an offence under section 264 of the *Criminal Code* (criminal harassment), or
 - (iv) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*.

However, even with a record for those offences, an individual may be eligible: the overarching public safety analysis is what matters. For example, someone with a criminal record for assault from years ago, where the facts are on the lower end of the spectrum, could get a licence. Alternatively, someone with a record for a recent domestic assault might be viewed differently by the firearms officer responsible for deciding whether to issue a licence or refuse an application.

Section 6 of the *Firearms Act* says that anyone prohibited from firearms possession by a prohibition order is ineligible to hold a licence. Section 5(2)(c) refers to a “history of behaviour that includes violence”, opening the door to considering behaviour that did not result in a finding of guilt (conviction or a discharge), if of concern from a public safety point of view.

When a person with a criminal record applies for a firearms licence, a firearms officer must conduct an investigation and make a determination about issuing the licence or refusing the application. Some criminal records may be so dated and unrelated to the public safety analysis that the officer can easily decide without speaking to the applicant. Others will necessitate not only speaking to the applicant, but to witnesses, family members or other references who can assist the officer in assessing public safety risk.

C. Voting Rights

Having a criminal record does not prevent someone from voting in federal, provincial or territorial elections, even if in custody at the time of the election.⁸⁷ However, certain municipalities have taken the position that incarcerated individuals cannot vote. Electoral offences (such as corruption charges) may disqualify a person from voting. Counsel should consult the relevant *Election Act* in their jurisdiction (see Other Resources).

⁸⁷ See, *R. v. Sauve*, [2002] 3 SCR 519. However, some municipalities take the position that incarcerated individuals cannot vote and it may be that municipal elections are not covered by what has already been litigated.

D. Family Matters

Criminal convictions can have a serious impact on family relationships. Howard Sapers, Canada's Correctional Investigator has reported that “[f]ederally incarcerated women are the fastest-growing segment of Canada's prison population, with 35% of them of aboriginal descent... and about two-thirds of them are mothers.”⁸⁸

According to a 2007 Corrections Service Canada (CSC) study, “paternal incarceration and reintegration can have significant collateral consequences on the family and on the community.”⁸⁹ The study found that about one-quarter of the incarcerated fathers surveyed reported having no phone or mail contact with their children while in custody, and 38.7% said they had no visits from their children. Non-custodial fathers also had greater problems with drug use and ongoing criminal activity than custodial fathers and non-fathers (who had similar patterns).

The study surveyed 534 federally sentenced men, who had a total of 595 children. Using this data, it estimated that 357,604 children were then affected by paternal incarceration, or 4.6% of the total Canadian population 19 years of age or younger. Nine percent of the fathers also had at least one child in trouble with the law, bringing the researchers to estimate that children of federally sentenced fathers were two to four times more likely to have conflicts with the law than other Canadian children.

Not all criminal matters relate directly to an inability for the offender to be an involved parent and there are special considerations where the offender has been the primary care parent. In these situations it may be important to discuss previous parental arrangements with anyone preparing a pre-sentence report, and with third parties who can help to maintain relationships between the children and the offender.

The impact of offenders' relationships with their children as a result of incarceration is also an important consideration for custody and access determinations, and commonly arises in domestic violence situations. One critical area is the interplay between recognizance orders and sentencing on the one hand, and custodial arrangements on the other. Even without a finding of guilt, allegations of abuse can have an impact on exclusive possession of the matrimonial home, sole custody, recognizance orders and more. If a parent is charged with domestic assault, it is common to include a ‘no contact’ order with the alleged victim and sometimes with children as well. The alleged victim is or becomes the primary caregiver of the children, and ‘no contact’ means access cannot be arranged without further court applications, cost and time. A ‘no contact’ order can also potentially limit the parent's participation in family court proceedings if those proceedings are not taken into account in the order. Once interim orders are in place, any subsequent orders will consider stability for the child in determining what is in the child's best interests, so the current situation is likely to be preferred over any proposed change.

If there is ultimately a finding of guilt in a domestic violence situation, any subsequent family law order may limit contact to only supervised access with the child.

‘No contact’ provisions can impede a parent's ability to participate in decision making about the children, even if the offence is not one that suggests an inability to participate in that decision making. Some lawyers have considered

⁸⁸ National Post: [Canada expanding rarely used program that lets mothers live with children in minimum security prisons](http://news.nationalpost.com/news/canada/canada-expanding-rarely-used-program-that-lets-mothers-live-with-children-in-minimum-security-prisons) (<http://news.nationalpost.com/news/canada/canada-expanding-rarely-used-program-that-lets-mothers-live-with-children-in-minimum-security-prisons>).

⁸⁹ Correctional Services Canada: [Incarcerated Fathers: A Descriptive Analysis](http://www.csc-scc.gc.ca/research/r186-eng.shtml) (www.csc-scc.gc.ca/research/r186-eng.shtml).

ways for an incarcerated parent or a parent with ‘no contact’ provisions to continue to participate in parenting decisions, such as through third party communication plans or use of parenting coordinators to assist the sentenced parent to continue being involved in major decisions regarding children. This is especially important for sentences of shorter duration, and can impact relocation decisions.

Probation officers who prepare pre-sentence reports should be informed of the family situations of the offender, so they are aware of the parenting role that the offender has had and consider how that might be impacted on sentencing. Another obvious consideration in the family law context is the impact of the offender’s incarceration on dependent children, in damage to the emotional bond and financial support of those children.

Counsel Considerations

- How will your client’s relationship with any children be affected?
- Consider whether any curfew restrictions may affect parenting time, or attendance at children’s extracurricular or school activities.
- Consider if no contact provisions may impact your client’s ability to participate in decision-making about the children, or to set up parenting time and access visits?
- Consider the impact being incarcerated will have on your client’s ability to attend family court, and include an ‘except for attending family court/or discussing parenting arrangements’ exception to ‘no contact’ orders where appropriate.
- Inform probation officers who prepare pre-sentence reports about the family situation of the accused.

E. Other Issues

Legislation and regulations governing professionals in Canada are a significant source of collateral consequences of criminal convictions. Most professional regulatory bodies can ask for criminal record checks (and exclude individuals based on some form of test, depending on the results of that check). The Canadian Civil Liberties Association has prepared an inventory of laws that reference record checks, and found a large number in relation to licensing bodies.⁹⁰

A national crime prevention study found that “obtaining legal employment is one of the best predictors of the post-release success of ex-prisoners. Ex-prisoners who are able to secure a legitimate job, particularly higher-quality positions with higher wages are less likely to reoffend than those ex-prisoners without legitimate job opportunities.”⁹¹

According to the Supreme Court of Canada:

The right of individuals with criminal convictions to employment and to re-enter the labour market are important values in our society. In the case of employment, the courts must take a firm stance against discrimination based on criminal record. The saying, ‘once a criminal, always a criminal’ has no place in our

⁹⁰ [False Promises, Hidden Costs](https://ccla.org/recordchecks/doc/Records-check-fina-20140516.pdf): Canadian Civil Liberties Association (May 2014) (<https://ccla.org/recordchecks/doc/Records-check-fina-20140516.pdf>).

⁹¹ Public Safety Canada: [The Social Reintegration of Offenders and Crime Prevention](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/index-en.aspx) (www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/index-en.aspx).

society. Individuals who have paid their debt to society are entitled to resume their place in society and to live in it without running the risk of being devalued and unfairly stigmatized.⁹²

Several human rights codes do not include having a criminal record as a prohibited ground of discrimination. Alberta, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan do not protect employees convicted of, or charged with an offence from discrimination. Employers are entitled to discriminate when there is a connection between the conviction and the requirements or nature of the job. Manitoba's human rights legislation has a catch-all provision which the Manitoba Human Rights Commission believes includes criminal record, but the issue has not been finally determined. Others, like Newfoundland and Labrador and British Columbia, protect employees from discrimination for charges unrelated to the specific employment. Some prohibit discrimination in employment based on a 'record of offences' that covers provincial offences and record-suspended convictions (pardons), but not other records. Distinctions between protections on pardoned convictions, convictions generally and those based on charges or convictions are important.

Convictions can also limit access to social supports such as subsidized housing or social assistance. For example, until 2015 in British Columbia a conviction for welfare fraud would ban a person from further social assistance.

Counsel Considerations

- Will the nature of the offence disqualify your client from voting or full participation in society in future?
- How will the nature of the offence limit your client's future employment or professional prospects?

⁹² *QC v Maksteel Quebec Inc.*, 2003 SCC 68 at 63.

NON-CONVICTIONS



NON-CONVICTIONS

Although this resource focuses on the collateral consequences of findings of guilt, non-conviction records can also result in similar and often unpredictable consequences and barriers. Canadians have limited power in this regard when seeking entry at foreign borders, but the *CRA* and *Privacy Acts* (federal, provincial and territorial) could preclude access to those records by the Canadian public and perhaps limit the use of those records by police, corrections and parole authorities.

We look first at how those records may come about and then at some typical examples of the problems that can arise. The term non-conviction records should be understood broadly, as it can encompass a wide variety of police and court records.

Non-conviction dispositions: findings of guilt

Conditional and absolute discharges are findings of guilt, but are not criminal convictions under the *Code*.

Non-conviction dispositions: no finding of guilt

These include all criminal justice and police interactions where a person was charged, but the charge did not end up in a finding of guilt. This may include instances where the person was acquitted, charges were stayed or withdrawn, and more.

A. Police Contact

A wide range of pre-charge or non-criminal contact with authorities can result in non-conviction records that may prejudice a person in many ways. These can include being questioned as a person of interest or a suspect of a crime (but not charged), police apprehensions and transport under provincial or territorial mental health statutes, and other observed behaviours that can result in flags in police databases, such as suspicions of gang affiliation or perceived suicide attempts.

When a prospective employer asks about a criminal record and the person has none because a charge was dismissed or stayed (but a file was opened and note of the non-conviction made), the employer may continue to make inquiries to decide if the events took place and go behind the notation. This practice can apply at borders when a person is questioned to determine admissibility. Corrections officials or Parole Board members may also dig deeper into these matters to determine reliability in assessing risk to reoffend, evaluating the issues to arrive at their own opinion about whether the person should have been convicted or was involved in the conduct under consideration. This can prejudice placement or chances for conditional release. Based on section 7 of the *Charter*, a record of anything short of an actual conviction should not be accessible by the public or used in decisions that may affect the life, liberty or security of the person. Access by others such as the police and corrections officials should be limited to use for intelligence purposes only and not for decisions that affect section 7 or other *Charter* rights.

After an acquittal, or if charges are withdrawn, clients (and their counsel) should be aware that a footprint of criminal justice activity has been created, and that may, in fact, impact some aspects of their future lives (e.g., employment searches). Further steps can be taken to vacate or mitigate the footprint, by applying to the local police agency to do

so.⁹³ These records may be held in local or national police databases or in other databases (eg. court record systems).

Unfortunately no one legislative source sets out what kinds of record checks police services must provide, or what types of records should be included on each level of record check. Individual statutes regulate the disclosure of specific types of non-conviction records.

Use of non-conviction records

Absolute and conditional discharges

Section 6.1(1) of the *CRA* prohibits disclosure of absolute and conditional discharges in the custody of the RCMP or with the Government of Canada after one and three years, respectively, without prior approval of the Minister of Public Safety. Section 6.1(2) complements this non-disclosure provision by requiring removal of all references to absolute and conditional discharges from RCMP-maintained police databases after the applicable time frames have ended.

Some municipal and provincial police services take the position that they are not bound by provisions specifically directing what the RCMP must do with discharges. Absolute and conditional discharges frequently remain in local police databases after being expunged from RCMP-managed databases. In the past, some local police services have also continued to disclose discharges on record checks from their local police files after the time limits in the *CRA*. However, research by the Canadian Civil Liberties Association found that now most, if not all, local police services are not disclosing these records in police record checks outside of the *CRA* timeframes.⁹⁴

Charges addressed with alternative measures

In some circumstances, the *Criminal Code* allows individuals accused of a crime to deal with the charges by court-approved alternative measures. If the person fully complies with the terms of the alternative measures program, the court must then dismiss the charges. Where a person has partially complied with the requirements, the court still may decide to dismiss the charges.

Police records for individuals processed via alternative measures should not be released on any police record check. Section 717.1 to 717.4 of the *Criminal Code* permit the police and other justice officials to keep records in these cases, but only allow for disclosure to specified individuals for specified purposes, or where authorized by a judge. No general provision permits disclosure to employers or volunteer agencies, and many police services take the position that these records should not be disclosed on record checks. However, some police services continue to disclose these records on record checks, presumably because section 171.4(3) of the *Criminal Code* gives individuals the right to have copies of their own information.

⁹³ This is described *infra* at 38.

⁹⁴ Canadian Civil Liberties Association, *The Presumption of Guilt? Disclosure of Non-Conviction Records in Police Background Checks* (Toronto: CCLA, 2012).

Youth records

Part 6 of the *YCJA* provides a comprehensive legislative scheme for the maintenance, access, disclosure, use and publication of youth records.⁹⁵ The Ontario Court of Appeal has said that this portion of the *Act* “demonstrates a clear intention to protect the privacy of young persons” and “seeks to avoid the premature labeling of young offenders as outlaws and to thereby facilitate their rehabilitation and their reintegration into the law-abiding community.”⁹⁶ The Supreme Court has emphasized the important goals served by confidentiality in the context of youth records.⁹⁷

The *YCJA* addresses these concerns by tightly restricting the access, use and disclosure of youth records. Sections 117 through 129 govern access to youth records, setting out an exhaustive list of authorities that may access youth records in a restricted time period (the access period). The access period varies based on several factors, including the disposition of the charge, the underlying offence and subsequent involvement with the justice system.⁹⁸ For the most part during this time, the only individuals who may access these records are the youth, counsel, and judicial, correctional or law enforcement officials directly involved with administering the young person’s case in the justice system.⁹⁹ Access to some types of records – including for example extrajudicial measures and medical records – is even more restricted.¹⁰⁰ One notable exception is the access granted for criminal record checks required by the government for employment or performance of services.¹⁰¹ If access to a record is permitted, section 129 of the *YCJA* limits further sharing of the records, prohibiting ongoing disclosure without specific authorization. After the access period has expired, an application must be made to a youth justice court judge to gain access to a youth record.¹⁰²

Although the intent of this regime is to shelter youth from long-term negative repercussions of a criminal record, this protection can be practically undermined. One common manner of youth record disclosure is through general police record checks. While employers, organizations and post-secondary institutions are generally not granted access to youth records, because the youth personally goes to the police station to ask for the police record check, some police services do release youth records on general record checks. Practices vary: some police services do not release youth records at all on general record check products; others only release records in this way so long as they are within the access period. Such practices result in otherwise inaccessible records being disclosed to, and used by, unauthorized parties. Ontario has recently passed legislation to ensure individuals can access police record checks that do not disclose these records.¹⁰³

⁹⁵ *YCJA*, SC 2002, c 1, sections 110-129 [*YCJA*].

⁹⁶ *S.L. v. N.B.*, 2005 CanLII 11391 (ON CA) at para. 35.

⁹⁷ *F.N. (Re)*, [2000] 1 SCR 880, 2000 SCC 35 at para. 14.

⁹⁸ *YCJA* section 119(2).

⁹⁹ *YCJA* sections 119, 120.

¹⁰⁰ *YCJA* sections 119(4), 119(5).

¹⁰¹ *YCJA* section 119(1)(o).

¹⁰² *YCJA* section 123.

¹⁰³ Bill 113, *An Act respecting Police Record Checks* (Ch. 30, Statutes of Ontario, 2015).

Other non-conviction dispositions and records of police contact

No specific statutory provisions direct how police can or cannot release other non-conviction dispositions and records of police contact. This means that a variety of non-conviction records, including withdrawn charges, acquittals, mental health act apprehensions and suspect information, can be included in different levels of record checks. Although federal, provincial and territorial privacy legislation restricts the information police can release, record checks generally operate based on an applicant's consent to release of the information. Consent may be a sufficient basis to authorize the release of non-conviction information under some privacy statutes.

Outside these statutory limits, the information disclosed on particular types of record checks usually depends on local police policies. Typically, a record check that includes a vulnerable sector check is the most in-depth level of record check for civil purposes. Because there is no statutory definition of a 'criminal record check' or 'police record check', however, even when police services offer a similar-sounding check, the policies on what types of records can be included may vary. A few jurisdictions have government guidelines that systematize how police services there can offer and release information on record checks.

B. Checks For Security Personnel

Federal, territorial, provincial and municipal governments can require a variety of security clearances for employment purposes. These range from those for employees with access to ports or airports, to volunteers at government-affiliated events (eg. international sport competitions), or prospective law enforcement agents. Many kinds of police and court records may be accessed in the course of these checks. Non-conviction records may also influence whether a person passes a specific government background check or receives a certain level of security clearance.

C. Non-Conviction Information and Travel

As previously outlined, police records can be stored in local, provincial, territorial and national databases. Several national police databases are managed by the RCMP through CPIC. National databases can contain non-conviction records for things like investigative notations, police flags of observed suicide-related calls or behaviour, pending charges and absolute and conditional discharges (within one and three years). Generally local police services decide, within the limits in the CPIC manual, what to upload to the national databases. Once information is uploaded it is available to law enforcement agents across Canada.

A wide range of information in the national databases managed by CPIC is also made available to other countries, including U.S. Homeland Security and border officials. CPIC functionality now allows local police services to select whether certain information in CPIC databases – in particular information about attempted suicides – will be shared with U.S. officials.¹⁰⁴ Although the CPIC User Manual provides some guidance to police services in deciding when to upload and disclose this information, individual police services have discretion to implement their own policies. A 2014 report from Ontario's Information and Privacy Commissioner suggested a standard that several police services

¹⁰⁴ See, Ontario Privacy Commissioner, *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC* (Toronto: OPC, 2014).

subsequently adopted¹⁰⁵ and in 2015 the Toronto Police Service published a policy outlining thresholds for uploading disclosure to U.S. officials, and removal request procedures.¹⁰⁶ Other local police services may have their own policies. Non-conviction information stored only in local police databases will not be readily accessible to U.S. border officials.

It is not uncommon for Canadians attempting to travel into or through the U.S. to be denied entry at the border due to non-conviction dispositions and mental health related police contact records stored in national Canadian police databases. They can sometimes be asked to comply with a pre-authorized waiver process established and controlled by the U.S. government to enter the U.S. Canadians have also been denied entry into trusted traveller programs (e.g. Nexus) because of non-conviction records, often resulting from direct U.S. access to CPIC records.

Once an individual has been denied entry to the U.S., a record may be created in U.S. databases. Even if the non-conviction record is subsequently removed from national Canadian databases, it is likely to remain in U.S. databases and pose problems for future travel to that country.

Individuals may request that their non-conviction dispositions be removed from CPIC by applying for destruction of their fingerprints, photographs and record of disposition. These requests should be directed to the local police service that first entered the information. The local service will process the request and, if approved, send a removal request to the RCMP, which manages the national databases. The RCMP has its own criteria to evaluate destruction requests at the national level.

D. Other Civil and Legal Consequences

The sections above primarily address barriers that arise in the areas of employment and travel. Academics researching the barriers posed by non-conviction records have found broader impacts in areas including family law proceedings, immigration, and access to housing, credit and insurance.¹⁰⁷ Researchers have found that, on a practical level, barriers from non-conviction records can mirror those from records of conviction. These barriers may occur because different actors ask for standard police record check products, or when government service providers, legal professionals or private companies (like insurance companies), are given direct access to a range of police records. There is no comprehensive source for the mechanisms through which non-conviction records impact individuals in these various areas.

Counsel Consideration

- If assisting a client encountering barriers to employment or travel, for example, with no previous criminal record of convictions, explore the possibility of inappropriate release of non-conviction information.

¹⁰⁵ *Ibid.*

¹⁰⁶ Extract from the Minutes of the Toronto Police Services Board, August 20, 2015, "Disclosure of Attempt/Threaten Suicide Information on CPIC to U.S. Customs and Border Protection".

¹⁰⁷ As an example, see [Canadian Civil Liberties Association Reports](https://ccla.org/recordchecks/reports/) (https://ccla.org/recordchecks/reports/).

PRISON CONSIDERATIONS



PRISON CONSIDERATIONS

At the point when a client appears for sentencing, the lawyer should have already provided the court with written submissions about important concerns for jail or prison placement.¹⁰⁸ Letters supporting a request can also be obtained and forwarded to the court and the Crown in advance, and evidence can be called at the sentencing hearing outlining any special concerns or needs of a client. Defence lawyers should be prepared with enough research to make informed recommendations in terms of placement (provincial versus federal, and then which particular institution in the provincial, territorial or federal system), treatment or potential risk, and to ensure those recommendations are on the record.

A. The Difference a Day Makes

Generally, where the sentence or its remainder is less than two years, an offender will be incarcerated in a facility operated by the province or territory. Sentences of two years or more will be served in a federal penitentiary. Before making a submission for incarceration (provincial, territorial or federal), consider the best option for your client, and perhaps see if the Crown will support a recommendation concerning the location or particular facility:

- How is the offence categorized? Will the possibility of conditional release differ depending on whether the sentence is in federal, provincial or territorial custody? What is the earliest possible release date in each system?
- Which institution is most likely in each scenario, and what are their reputations? In addition to length of sentence, the institution where your client will be held will also depend on the level of security assessed to your client.
- Consider your client's personal vulnerability, or street toughness. If your client is mentally or physically ill, has FASD, has addiction issues, or is illiterate, how will that impact each scenario? Consider too your client's access to suitable programming.
- If leaning toward federal institutions because of reputations for having more accessible programming, check into the realities of current available programs, and consider if programming can be included in your client's correctional plan at sentencing.
- How long will the 'pen placement' classification process take? The federal wait can be significantly longer, and consider where your client will be held pending classification.
- Consider family ties in various locations, and proximity to the offender's home. Also, consider the visiting rules and facilities at the respective institutions.
- For women, there will be fewer options, so pay special attention when considering these points.
- Consider how aboriginality is likely to impact the possibility of parole and the time incarcerated.
- Consider age or disability, and how that will impact your client's life in each setting.

¹⁰⁸ This chapter borrows from a 2008 article, *What to know when your adult client is going to prison*, with the permission of the author, Sandra Leonard. It was updated with the assistance of Mary Campbell, former Director General, Corrections Canada. As with all aspects of this resource, this summary is not comprehensive, and does not offer legal advice. Note, in particular, it does not address youth imprisonment issues nor the disparate impact of incarceration on particular populations, most notably Indigenous populations.

B. Information the Authorities Receive

Information from the sentencing process is sent to the institution where the client is housed, and will impact your client's sentence, inside the institution and upon release.

If your client is sentenced to a federal institution, the sentencing judge must forward to the prison and CSC “reasons and recommendations relating to sentence or committal, any relevant reports that were submitted to the court, and any other information relevant to administering the sentence or committal”.¹⁰⁹ This means that materials CSC receives may include those that defence counsel tried to disprove, or victim impact statements that were deemed inaccurate or lacking in credibility. Police contact with security personnel at federal institutions at the reception stage, for example, can result in information (such as an affiliation with organized crime) that was not raised in court, being passed along to CSC. The requirements for forwarding court documents to provincial or territorial institutions are less structured and applied less routinely.

C. Information You Can Provide

Federally, section 24(1) of the *Corrections and Conditional Release Act (CCRA)* requires CSC to take “all reasonable steps to insure that any information it uses is as accurate, up to date and complete as possible”, so counsel can rely on that section to provide information that will benefit the client.

At the provincial and territorial level, counsel may provide materials to help with the chronology of the case, reasons for judgment or sentencing, copies of letters in support of the client that were presented to the court, professional reports about risk assessment or treatment needs, and other sentencing exhibits, as well as the same medical information noted for federal institutions.

Judicial recommendations must be considered¹¹⁰ and if attached to cogent reasons, can be helpful. However, recommendations for treatment can be a double-edged sword. For example, if the judge recommends treatment for longstanding substance abuse, corrections personnel might decide that not just the typical substance abuse program, but an intensive treatment program is required. If the programs are full or unavailable, this can delay eligibility for parole for your client.

Remember that judicial recommendations on the particular penitentiary where an offender should be incarcerated do not carry weight under the *CCRA*. However, the reasoning behind the judge's recommendation may help CSC in determining the appropriate penitentiary placement. If you plan to ask a judge to make a specific recommendation on an institution, you need to prepare, do the advance research and perhaps even call evidence at the sentencing hearing.

Your client may want to request a copy of the institutional file when incarcerated. After obtaining it, the client is entitled to request corrections of any errors or omissions.¹¹¹ Incorrect information can take on a life of its own, be repeated endlessly and adversely affect sentence administration for years.

¹⁰⁹ *CCRA* sections 4 and 23(1).

¹¹⁰ *Ibid.*

¹¹¹ *CCRA* section 24.

Your client's identity documents, particularly photo ID, should be given to a trusted person who will take note of expiry dates. Lack of photo ID is a major problem for ex-offenders on release. For example, in some provinces and territories, if a driver's licence has expired for a certain period, the ex-offender must re-apply for a learner's permit, no matter how old or how much driving experience they have.

D. When Will My Client Get Out?

The answer will depend on whether your client received a federal, provincial or territorial sentence, the realities of obtaining institutional support, the programs deemed necessary for release, and your client's behaviour while inside.

Federally, types of conditional release (i.e., before the sentence is over) are:

- escorted Temporary Absences (ETA)
- unescorted Temporary Absences (UTA)
- work release
- parole (day parole, full parole)
- statutory release and supervision
- long term supervision
- detention until warrant expiry date (WED)
- medical or compassionate leave

Provincially and territorially, release options are:

- temporary absence
- parole
- remission-based release (no supervision to follow)

Determining whether and when your client may get parole requires consideration of the individual: prior record, behaviour while on other forms of conditional release, behaviour in the institution and attitude. Whether your client has been able to receive the programming designated as a prerequisite to release is extremely important, though often beyond the client's control because of availability of programs in the institution.

The National Parole Board is the paroling authority for the federal penitentiary system and also for provincial and territorial systems other than Ontario and Quebec. Parole criteria and procedures are similar in those provinces; however, release through temporary absences is much more common than parole in all provinces and territories, due to the average length of sentences.

E. Test for Granting Parole

Since 2006 amendments under what was then Bill C-10, Parole Board decisions should be consistent with the protection of society and are no longer aimed at the least restrictive conditions consistent with that protection. The amendments require the Board to consider the nature and gravity of the offense, as well as the degree of responsibility of the offender. The re-application period for day parole and full parole has been extended from six to twelve months

(following an unsuccessful application). The final important change was to add the ability to impose a residency clause during statutory release.¹¹²

Several offences automatically result in a mandatory detention review by the Parole Board prior to statutory release.¹¹³ In addition to the standard test for detention review that CSC may use, specific categories (serious drug offences) or specific offences now mandate a detention review and many types of sexual offences are ineligible for parole.

F. Procedure for Parole

All parole applications proceed with a hearing, unless the offender waives it or the Parole Board has previously agreed to a similar type of release, in which case a paper decision is permissible.

Where an offender asks to be released to an Indigenous community, the community is notified of the parole application (with consent only) and has a chance to propose a plan. Circle hearings can be held, and elders are often present.

Offenders in each circumstance must receive materials the Parole Board will consider at least 15 days before the hearing. The offender is entitled to have an 'assistant' at the hearing, which can be a lawyer, family member or other community support.

Other people can apply to attend Parole Board hearings as observers (for example, victims, family members, or the media). Various considerations are taken into account in determining whether this will be permitted. Interested parties can also apply for release of Board decisions, under the Decision Registry.

A parole hearing is an inquisitorial process, not an adversarial one. Questions at the hearing are asked by Parole Board members, and the offender is the only 'witness'. The CSC parole officer will be at the table with the offender, and may be asked questions by the Board. Whether or not the parole officer supports the release is an important, but not determinative, consideration for the Board. There is no power to subpoena and no specific rules of evidence. The offender or the assistant has a chance to make submissions at the end. The Board then meets in private, calls the offender back and delivers the decision orally, with a written version to follow.

G. Conditions for Release

Section 161 of the *CCRA* Regulations includes standard conditions for release – reporting to parole supervisors or police, carrying release certificates and identity documents at all times, geographic restrictions and more. Parole Boards can add special conditions specifically tailored to individual offenders, but are limited to what is reasonable and necessary to manage any risk.

As either federal, provincial or territorial jurisdictions retain control over the offender, the offender can be suspended during the remainder of the sentence based on a belief that any condition imposed was breached, or to prevent a

¹¹² *CCRA* section 133(4.1).

¹¹³ *CCRA* sections 129 and 130.

breach or protect society. If suspended, the offender will normally be returned to custody to await either cancellation of the suspension decision or referral for a post-suspension review by the paroling authority.

Counsel Considerations

- How is the offence categorized? Will the possibility of conditional release differ depending on whether the sentence is in federal, provincial or territorial custody? What is the earliest possible release date in each system?
- Which institution is most likely in each scenario, and what are their reputations? This will also depend on the level of security.
- Consider your client's personal vulnerability or street toughness. If your client is mentally or physically ill, has FASD, or is illiterate, how will that affect each scenario, and access to programming?
- If leaning to federal institutions for reasons of more available programming, check into the current program availability in reality.
- How long will classification take? The federal wait can be significantly longer, and consider where your client will be held pending classification.
- Consider family ties, and proximity to the offender's home. Also, consider visiting rules and facilities at each institution.
- For women, there will be fewer options, so pay special attention when considering these points.
- Consider how aboriginality is likely to impact the possibility of parole and the time incarcerated.
- Consider age or disability, and how that will impact your client's life in the various settings.

You may wish to also consider:

- Advising clients to be proactive in mitigating their exposure: Participating in relevant counseling programs or completing a period of community service may persuade the court to consider a non-conviction outcome, a plea to a lesser offence, or, a more favorable sentencing position.
- Ordering a copy of the transcript of the guilty plea or Reasons for Judgment after trial, especially if these occurred on a different day than sentencing, to ensure that comments from defence counsel are noted.
- Asking if the judge will forward the first half of the plea to CSC (s 732.2) to add more details to the materials.
- Speaking to the issue of what the judge may send to CSC, with the goal of preventing information seen as inaccurate or incredible from becoming part of the package of 'facts'.
- Providing an Agreed Statement of Facts to address other omissions or one sided information.
- Including comments from the Crown or judge confirming other facts.
- Providing written confirmation of personal details, eg transcripts or diplomas, union cards, or employment records, to save your client from inappropriate job training or remedial education.
- Supplying prescriptions or information about ongoing medical concerns to be supplied to health care personnel and possibly the records department.

H. Appealing a Parole Decision

Federally, and for jurisdictions relying on the federal regime, offenders may appeal in writing to the Parole Board (Appeal Division). Section 147 of the *CCRA* lists grounds for appeal. The Board can then affirm a decision, affirm with further case review at an earlier date than previously scheduled, order a new review, or reverse, cancel or vary the decision. An adverse appeal decision is reviewable in Federal Court. Under the *CCRA*, provinces have the option of either applying the federal parole regime, or creating their own Board for sentences under two years, so long as the enabling legislation does not contradict or limit the federal rules. Quebec, Ontario, and BC have adopted legislation creating their own parole boards for sentences under two years.

OTHER RESOURCES



OTHER RESOURCES

CBA Resources

- **Potential Collateral Consequences under Canada's Provincial/Territorial Legislation**
- **Collateral Consequences of Criminal Convictions: Annotated Bibliography**

Further Resources

- **Statutes**

Criminal Code of Canada

Youth Criminal Justice Act

Corrections and Conditional Release Act

Prisons and Reformatories Act, RSC 1985, c.P-20

Provincial and Territorial Correctional Services legislation

Privacy Act, S.C.

Access to Information Act, RSC, 1985, C.A-1

Provincial and Territorial Privacy and Access to Information legislation

- **Policy Guidelines and Directives**

[Commissioner's Directives](http://www.csc-scc.gc.ca) (www.csc-scc.gc.ca)

Standing Orders of Wardens

- **Policy Manuals**

Parole Board of Canada

Provincial and territorial Parole Board manuals

- Parole Board of Canada Decision Registry

- Corrections Service Canada/Parole Board of Canada/Public Safety Canada publications



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