Update on Criminal Inadmissibility

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Division 4 of the Immigration and Refugee Protection Act ("IRPA") sets out the various grounds of inadmissibility along with a number of evidentiary and procedural matters. This paper will focus on the grounds of criminal inadmissibility set out in section 36. It will not address the related grounds of inadmissibility such as those under sections 34 (security), 35 (international crimes) and 37 (organized criminality), each of which would provide ample material for a lengthy paper on their own.

Section 36 sets out the grounds that render individuals inadmissible for criminality. The most fundamental distinction in s.36 is between criminality and serious criminality. Criminality, as described in s.36(2), only affects foreign nationals:

A36 (2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Serious criminality, set out in s.36(1), is essentially a subset of the scope of inadmissibility set out in s.36(2), affecting both foreign nationals and permanent residents:

A36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

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1 Paper prepared for the Canadian Bar Association National Immigration Conference (Montreal, May 11, 2013). A previous version of this paper was presented at the CLEBC Immigration Issues in Depth seminar (Vancouver: December, 2012).
having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

The distinction between s.36(1) and s.36(2) is important even aside from the impact on permanent residents. Although a foreign national described by s.36(1) would almost invariably also be described in s.36(2), the consequences of s.36(1) inadmissibility are more severe. The relief mechanisms for a foreign national described by s.36(1) are more restricted and generally more onerous than those for s.36(2) inadmissibility. With the implementation of recent changes to IRPA, someone who is inadmissible under s.36(1) as a result of a conviction will also be ineligible to make a refugee claim.2

For a foreign national or permanent resident found inadmissible in Canada under s.36, the consequence will be the issuance of a deportation order. A permanent resident or a protected person may have a right to appeal the order to the Immigration Appeal Division which can exercise equitable jurisdiction in deciding whether to affirm, quash or stay the order. A conditional stay of removal, often with a duration of several years, is a common result in criminality appeals.

The following sections will address some of these issues, as well as the various criteria relevant to the application of the section. In many cases, immigration counsel will be advising clients or criminal defence counsel prior to a plea or a conviction, whether in Canada or abroad. Strategies to avoid inadmissibility or maintain appeal rights will also be discussed in the relevant sections.

Evidentiary Standard

The standard of proof for inadmissibility under s.36 is reasonable grounds to believe,3 except for a finding of inadmissibility of a permanent resident under s.36(1)(c), which must be proven on a balance of probabilities.4

Offence under an Act of Parliament

The most fundamental element for inadmissibility under any of the parts of s.36 is that the offence in question either be an offence under an Act of Parliament, or the equivalent of such an offence. An Act of Parliament refers to legislation passed by the federal government, and includes a wide array of statutes such as the Criminal Code, Controlled Drugs and Substances Act, Customs Act and IRPA itself. However, an act that is an offence under a municipal or provincial statute will not render someone inadmissible under the section. Similarly, contempt of court would not render someone inadmissible for criminality, even if there were a lengthy term of imprisonment imposed, as the power to cite for contempt is based on the common law and does not arise from an Act of

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2 PCISA – 2012, c. 17, s. 34: Paragraphs 101(2)(a) and (b) of the Act are replaced by the following:
(a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
(b) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.
3 IRPA s.33.
4 IRPA s.36(3)(d).
Parliament. Evaluating equivalency will be explored in more detail below, but it should be underlined that it does not matter if an offence is a federal, state or municipal offence in the foreign jurisdiction. The relevant point of analysis will be whether the equivalent offence in Canada is under an Act of Parliament.

**Convictions in Canada**

With respect to offences committed in Canada, s.36 requires that there be a conviction for inadmissibility to arise. Dispositions which do not result in a conviction will therefore not render individuals inadmissible under s.36(1)(a) or s.36(2)(a). Examples of such dispositions include:

- diversion or extra-judicial measures;
- discharge (whether conditional or absolute);
- acquittal or stay of proceedings;
- finding of not criminally responsible by reason of mental disorder;
- order under s.810 of the *Criminal Code* or common law peace bond.

The *Youth Criminal Justice Act* does not refer to dispositions as convictions unless the matter is elevated to adult Court. However, this issue is dealt with directly in s.36(3)(e) and will be discussed in more detail below. Offences which for which a pardon or a record suspension has been granted are specifically addressed in s.36(3)(b) and will also be discussed below.

**Committing an offence outside Canada**

The provisions in s.36(1)(c) and 36(2)(c) with respect to committing an offence outside of Canada do not require that the person be arrested, charged or even investigated for the offence in question. As a result, the scope of the provisions is quite breathtaking and would include anyone who had ever committed an offence in their lives. In practice, the provisions do not appear to be widely used given the limited reference to them in the jurisprudence. Manual ENF 2 provides some guidance on when the provisions may be used:

- an officer is in possession of intelligence or other credible information indicating that the person committed an offence outside Canada;
- authorities in the foreign jurisdiction indicate that the alleged offence is one where charges would be, or may be, laid;
- the person is the subject of a warrant where a formal charge is to be laid;
- the person is fleeing prosecution in a foreign jurisdiction

**Committing an Offence Upon Entering Canada**

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5 This analysis is confirmed in Operational Bulletin 036 of August 8, 2007 and the ENF 14 Citizenship and Immigration Canada policy manual.

Section 36(2)(d) renders foreign nationals inadmissible for committing prescribed offences upon entering Canada. The provision is used as a basis to effect rapid removal of an individual found committing an offence upon entry if charges are not laid. ENF 2 describes the purpose and application of the section as follows:

In keeping with Canada's continuing efforts to protect Canadian society and to prevent criminals from accessing Canada, paragraph A36(2)(d) is intended to enhance the ability of officers at a port of entry (POE) to efficiently remove foreign nationals where the commission of an offence occurs at the POE, regardless of a local policing authority decision or practice not to lay charges.

It is important to note that it is not the government's intention that the A36(2)(d) provision be used as an alternative to prosecution. In fact, when charges are laid officers are to await the disposition of those charges before alleging inadmissibility under any of the criminality provisions. Where charges have not been laid, however, officers may consider writing an A44(1) inadmissibility report using the provisions of A36(2)(d).

Section 19 of the IRPR currently sets out the prescribed Acts as the Criminal Code, the Immigration and Refugee Protection Act, the Firearms Act, the Customs Act and the Controlled Drugs and Substances Act.

Youth Sentences

IRPA specifically excludes contraventions and youth sentences from the inadmissibility provisions:

A36 (3) (e) (e) inadmissibility under subsections (1) and (2) may not be based on an offence […]

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.  

The question of whether the exemption in 36(3)(e) applied when a case was transferred to adult Court under the Young Offenders Act (YOA) was addressed by Kelen J. in Tessma v. Canada (Minister of Citizenship & Immigration) 2003 FC 1126. Under the YOA, the procedure was for the matter to be transferred to the normal Court for the trial itself, and therefore the finding of guilt and ultimate conviction would all take place in a normal Court. There was no finding of guilt under the YOA, and therefore s.36(3)(e) did not apply.

On its face, the situation with the YCJA would have appeared to have been somewhat different prior to the amendment brought into force December 15, 2012. The previous version simply referred to a finding of guilt under the YCJA. Unlike under the YOA, the procedure under the YCJA is that a finding of guilt is made by the youth Court judge even in cases where an adult sentence is imposed.

Justice Shore had considered the impact of imposition of an adult sentence under the YCJA in Saint Jean c. Canada (Sécurité publique et Protection civile), 2009 CF 1243 and again in M’Bosso v.  

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7 2001, c. 27, s. 36; 2008, c. 3, s. 3; 2010, c. 8, s. 7; 2012, c. 1, s. 149.
Canada (Citizenship and Immigration), 2011 FC 302, both of which found that only youth sentences were subject to exemption under 36(3)(e). At the time of both decisions, IRPA did not refer explicitly to the YCJA at all, given the new wording of the section there can be no doubt that the exception under 36(3)(e) only applies to youth sentences, whether imposed under the YOA or the YCJA.

Summary, Indictable and Hybrid Offences
In Canadian criminal law, offences can either be proceeded with summarily or by indictment. The distinction is roughly similar to that between misdemeanors and felonies in the United States. There are a few offences in the Criminal Code that are strictly summary or strictly indictable, the vast majority of offences are hybrids with which the Crown can elect to proceed either summarily or indictably. The maximum penalty for an offence in a summary proceeding is usually substantially lower than the same offence proceeded with by indictment.

For the purposes of IRPA, however, hybrid offences are deemed to be indictable offences:

36.(3) The following provisions govern subsections (1) and (2):
(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;[...]

The practical consequences of this can be quite serious for both permanent residents and foreign nationals. Any conviction for a hybrid offence will lead to inadmissibility for a foreign national. For permanent residents, even a summary proceeding could lead to loss of permanent residence if the indictable version of the offence carries a maximum penalty of 10 years or more.

While most offences in the Criminal Code are either hybrid or indictable, it is often worthwhile to see if there is a strictly summary section which fits the facts of the case. For example, the summary offence of obtaining transportation by fraud might fit the facts in a case where someone might otherwise be convicted of the hybrid offence of fraud. A plea to an included summary offence such as simple possession of marijuana in an amount less than 30 grams may also be an option in certain cases.

For a foreign national, convictions for two summary offences arising out of a single occurrence are preferable to a single conviction on a hybrid offence. Two summary offences arising out of separate occurrences will render a foreign national inadmissible.

It should further be noted that under the rehabilitation provisions of IRPA a foreign national convicted of two summary offences arising out of separate occurrences will be deemed rehabilitated five years after completion of sentence if there are no further convictions. Those convicted of a hybrid or indictable offence will have to apply for a pardon or record suspension, and will have to wait a prescribed period before being eligible to apply. Changes to the pardon regime are discussed later in the paper.

Maximum sentence of 10 years or more
Any offence for which the indictable version carries a maximum penalty of 10 years or more will render either a foreign national or a permanent resident inadmissible upon conviction. The maximum penalties for indictable offences in the Criminal Code tend to be at thresholds of 2, 5, 10, 14 years or

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8 Criminal Code s.393(3).
9 Criminal Code s.380(1)(b).
10 Controlled Drugs and Substances Act, s.4(5).
11 IRPR s.18.1.
life imprisonment. The offences caught by the section are those with maximum penalties of 10 years, 14 years or life.

**Terms of imprisonment**

With respect to sentences actually imposed, there are two thresholds for terms of imprisonment that are pertinent. A term of imprisonment of more than 6 months will render a permanent resident or foreign national inadmissible for serious criminality even if the maximum penalty for the offence in question is less than 10 years.

A sentence of two years or more will have much more serious repercussions for a permanent resident, as they will not only be found inadmissible, but will also lose any right to appeal their removal from Canada to the Immigration Appeal Division. Bill C-43, which is currently before Parliament, has proposed to reduce this threshold to 6 months imprisonment, meaning that permanent residents sentenced to more than 6 months imprisonment will not have a right of appeal.

Prior to the passage of *PCISA*, a person was ineligible to make a refugee claim as a result serious criminality if convicted for an offence where the maximum penalty is at least ten years and a term of imprisonment of two years or more is imposed. As of December 15, 2012 the two year threshold has been removed, and anyone inadmissible for serious criminality is ineligible to make a refugee claim. That being said, there is an apparent redundancy in the amended version of s.101(2) which may provide some basis for an argument that the ineligibility ought only to apply to convictions in cases where there are actual proceedings by indictment. Essentially, the argument would be that if the broad criteria for “serious criminality” in 36(1)(a) were meant to apply in s.101(1)(f), then there would be no need for 101(2) at all. If 101(2) is meant to provide some limitation on serious criminality, a reasonable interpretation would be that hybrids would not be deemed indictable for the purposes of 101(1)(f). This would be in keeping with the interpretation by the Courts of Article 1F(b) of the *Refugee Convention*. The Federal Court of Appeal in *Jayasekara* specifically referred to the mode of prosecution as a factor to be considered in assessing seriousness under Article 1F(b). A similar argument may be available with respect to s.101(2)(b) in cases of foreign convictions.

Pre-sentence custody that is expressly credited towards a person’s sentence will count in assessing the length of the sentence under *IRPA*. It may therefore not be helpful for a sentencing judge to credit the full amount of pre-sentence custody on the record if the resulting sentence will exceed the relevant threshold.

It is important to note that the criteria with respect to length of sentences apply to each individual offence and not to the global sentence. When an accused is convicted on multiple counts, it may therefore be possible to meet the principles of sentencing through consecutive sentences, none of which exceeds the relevant limit. In *R. v. Hennessy* [2007] ONCA 581 the Ontario Court of Appeal varied a sentence for five counts of robbery such that none of the individual sentences exceeded two years, although the total sentence remained 35 months in addition to 7 months credit for pre-sentence custody. Such an approach would also be applicable in avoiding a 6 month threshold.

The Supreme Court of Canada recently confirmed the approach taken by most Courts of Appeal in addressing immigration consequences at sentencing. The issue in *Pham* was whether a sentence

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12 *IRPA*, s.64.
13 *Protecting Canada’s Immigration System Act*.
14 *IRPA*, s.101(1)(f).
16 *R. v. Pham*, 2013 SCC 15
should be reduced from two years to two years less a day to preserve a right of appeal to the IAD. The Court confirmed that immigration consequences could be considered as a factor on sentencing as long as it was not used a basis to take a sentence outside the range that was otherwise appropriate for the given offence and offender.

**Conditional Sentence Orders**
Conditional sentences are defined as a sentence of imprisonment in 742.1 of the *Criminal Code* and arguably count as a “term of imprisonment” under *IRPA*. The Supreme Court of Canada addressed the nature of conditional sentence orders in *Proulx*, confirming the view that they are sentences of imprisonment served in community. The Federal Court has not directly dealt with this issue in relation to s.36 or appeal rights, but similar wording was addressed in relation to s.50 of *IRPA* in *Mokelu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 757, and a conditional sentence was found to be a “term of imprisonment”. The Board has found that a conditional sentence is considered a "term of imprisonment" for purposes of s.36.

In cases since *Proulx*, the Supreme Court of Canada has somewhat tempered the interpretation that conditional sentence orders are to be strictly interpreted as sentences of imprisonment. Given that a conditional sentence will generally be longer than an equivalent term of incarceration, there may be grounds to revisit the interpretation of “term of imprisonment” in *IRPA* if the proposed restriction of appeal rights in C-43 is implemented. A strict interpretation would have the absurd result that an offender who served a term of incarceration because they were found unfit for a conditional sentence would maintain appeal rights, while a similarly situated offender serving their sentence in the community would have no appeal.

However, until this issue is clearly decided, it may be preferable for someone to serve under six months of incarceration rather than a longer conditional sentence. In cases where a conditional sentence of longer than six months is being considered, it is worth considering whether sentencing objectives can be met through a longer term of probation and/or more restrictive conditions in addition to a 6 month conditional sentence.

**Foreign Offences**
In assessing inadmissibility for convictions or offences committed outside Canada, a number of issues will arise surrounding the equivalence to Canadian offences or processes. There are essentially three areas that will be relevant, and each will be addressed in turn. The first is whether the offence in the foreign jurisdiction is the equivalent of an offence under an Act of Parliament. The second question, which is not relevant to the “committing an act” provisions in 36(1)(c) and 36(2)(c), is whether it is the equivalent of a conviction. Finally, the equivalency of relief provisions in foreign jurisdictions may become relevant in a case where there is a conviction and an equivalent offence.

**Equivalency of Offences**
Three approaches to evaluating equivalency were set out by the Federal Court of Appeal in *Hill*. The Court found that equivalency could be determined:

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18 See, for example, *R. v. Middleton*, 2009 SCC 21 in which the Court finds that a conditional sentence is not a “sentence of imprisonment” for the purposes of s.732 of the *Criminal Code*. 
[1] by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining there from the essential ingredients of the respective offences;

[2] by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and

[3] by a combination of one and two.19

The key to equivalency analysis is to focus on the essential elements of the offence rather than the particular wording of the foreign statutes or the exact names given to offences. The issue is not whether the foreign law uses the same words to describe the offence but if the essential elements are equivalent20. The specific offence being considered in Hill is illustrative in this respect:

Certainly we cannot assume that theft in Texas has the same elements as it has under the Criminal Code. This is particularly so in light of the wording of the indictment upon which the applicant was convicted. That indictment appears to indicate that theft in Texas is the obtaining of property unlawfully from a person without the effective consent of the owner and with the intent to deprive the owner of his property. While the requirement in our Code that the taking be done "fraudulently" may conceivably be met by the indictment's use of the word "unlawfully", there is nothing to indicate that Texas law includes the important additional requirement that the taking be "without colour of right". It is elementary that this is an essential ingredient of the offence of theft in Canada.21

In cases such as theft or fraud where a monetary value may affect the nature of the offence under Canadian law, the exchange rate in effect at the time of the commission of the offence should be used for conversion22.

In many cases, the essential elements will not line up precisely and the scope of the offence is broader in one jurisdiction. If the Canadian offence is broader, then the narrower foreign offence is by definition included and therefore equivalent. The FCA in Brannson addressed the situation where a foreign offence is broader:

I should, perhaps, indicate that where, as here, the definition of the foreign offence is broader than, but could contain, the definition of an offence under a Canadian statute, it may well be open to lead evidence of the particulars of the offence of which the person under inquiry was convicted. If, for example, the relevant count -- the count on which a conviction was obtained -- in a foreign indictment contained particulars of the offence, such particulars might well, in my view, be pertinent in establishing that the actual conviction was a conviction of an offence which, had it been committed in

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19 Hill v Canada (Minister of Employment and Immigration) (1987), 1 Imm LR (2d) 1 at para 16.
21 Hill at para 5.
Canada, would have been an offence here. Such particulars might so narrow the scope of the conviction as to bring it within the terms of a Canadian offence.23

It will often be of assistance to consult criminal counsel in the foreign jurisdiction or in Canada to gain a better understanding of the offences in question. While certain offences or the facts underlying a specific case may not give any cause for confusion, in many cases merely reviewing the wording of a statute does not provide an accurate sense of the offence as it has been interpreted in the relevant jurisdiction. For example, many offences remain in the Criminal Code despite having been reinterpreted or even struck down by the Courts. In other cases, there may be relevant defences that are not apparent on the face of the statute. At the very least, counsel would be wise to use an annotated version of the relevant statutes.

Driving offences are good example of the relevance of context and judicial interpretation. For the offence of “negligent driving in the second degree” (RCW 46.61.525) in Washington state, the standard of negligence required is defined as follows:

(2) For the purposes of this section, "negligent" means the failure to exercise ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances.

While this might be the equivalent of a provincial offence in Canada, it does not appear to meet the higher standard for dangerous driving under s.249 of the Criminal Code. The Supreme Court of Canada addressed the issue of the level of negligence required in a criminal context in R. v. Beatty, 2008 SCC 5:

[35] In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver’s liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver’s mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

[36] For that reason, the objective test, as modified to suit the criminal setting, requires proof of a marked departure from the standard of care that a reasonable person would observe in all the circumstances. As stated earlier, it is only when there is a marked departure from the norm that objectively dangerous conduct demonstrates sufficient blameworthiness to support a finding of penal liability. With the marked departure, the act of dangerous driving is accompanied with the presence of sufficient mens rea and the offence is made out. The Court, however, added a second important qualification to the objective test — the allowance for exculpatory defences.

The truck driver in Beatty had crossed the dividing line of a highway, striking another vehicle and killing all three occupants. The Supreme Court of Canada was unequivocal that this did not meet the criminal standard of negligence.

23 Ibid. at para 42.
The actual length of the sentence imposed in the foreign jurisdiction, although it may be relevant to discretionary relief, is not relevant in assessing equivalency. The relevant point of reference is the equivalent offence in Canada. This can be both an advantage and a disadvantage. An individual convicted of an offence for which the equivalent Canadian offence is 10 years would be inadmissible for serious criminality\(^{24}\). Conversely, a permanent resident convicted abroad of an offence for which the equivalent Canadian offence has a maximum penalty of less than 10 years would not be inadmissible for serious criminality even if the actual sentence imposed was significant.

### Equivalency of Conviction

If an offence is the equivalent of an offence in Canada, the next stage of the analysis will often focus on the equivalency of the conviction itself. Just as there are a number of dispositions in Canada short of a conviction, foreign jurisdictions will also have similar mechanisms. The term used to describe the foreign process may not be of assistance in assessing equivalency, and it will be necessary to look at the elements of the process itself to determine whether it is the equivalent of a conviction in Canada. The manuals, and in particular ENF 14, set out the criteria to be applied in assessing the equivalency of various provisions. ENF 2 contains a chart with common dispositions in the United States to encourage consistency in the application of the provisions\(^{25}\). ENF 14 directs officers in a number of factors to consider in assessing offences committed by youth in foreign jurisdictions.

### Pardons and Record Suspensions

A36 (3) (b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

The pardon regime in Canada has changed significantly over the past two years. The *Limiting Pardons for Serious Crimes Act*, making significant changes to the pardon regime, was assented to on June 29, 2010. Further changes were introduced in the more recent omnibus criminal law package passed by Parliament in the spring of 2012. The second set of changes did away with pardons altogether and renamed them “record suspensions”.

Under the previous legislation\(^{26}\), there were two categories of offences. An applicant was required to be conviction-free for at least three years after completion of sentence\(^{27}\) to receive a pardon for a summary conviction offence. To be pardoned for an indictable offence required a period of “good conduct” for at least five years after completion of sentence.

The Federal Court has addressed the issue of good conduct in at least two cases under the previous legislation, providing a clear indication of the breadth of discretion to be afforded to the Board in assessing good conduct. In *Conille v. Canada (AG)* 234 F.T.R. 93, the applicant was considered by the police to be the main suspect in a murder case from several years earlier. The Board relied on the fact that the police had an ongoing investigation to decide that the applicant was not of good conduct and to deny the pardon. In *Yussuf v. Canada (AG)*, 2004 FC 907, a similar issue arose with respect to charges that had been stayed after one of the eyewitnesses to an alleged fraud proved to be tainted.

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\(^{24}\) See *MCI v. Pulido Díaz* 2011 FC 738.

\(^{25}\) ENF 2 at pp.60-61.

\(^{26}\) R.S., 1985, c. C-47, s. 4; R.S., 1985, c. 1 (4th Supp.), s. 45(F); 1992, c. 22, s. 4; 2000, c. 1, s. 1(F).

\(^{27}\) “sentence” has the same meaning as in the *Criminal Code*, but does not include an order made under section 109, 110, 161 or 259 of that Act or subsection 147.1(1) of the National Defence Act. [s.2 of *Criminal Records Act*]
The new legislation creates three categories of offences and makes the application process somewhat more onerous for all types of record suspensions.

1 - Non-listed summary conviction offences

There are two changes affecting summary conviction offences. The first is the extension of the period before eligibility for a record suspension from three to five years. The second is a requirement of being of good conduct, which is more onerous than the previous requirement not to be convicted of any further offences.

2 – Indictable offences

The main difference between this category and the previous category is the length of time before an applicant is eligible to apply for a record suspension, which is to say 10 years after completion of sentence. In addition to the requirements that the applicant have been of good conduct during the period preceding the application, the new legislation also added three additional criteria. The applicant bears the onus of demonstrating that the pardon would:

1. provide a measurable benefit to the applicant;
2. sustain his or her rehabilitation in society as a law-abiding citizen; and
3. not bring the administration of justice into disrepute

If someone is convicted of more than three indictable offences, they will never be eligible for a pardon. There is no indication this refers to separate prosecutions, so someone could presumably become ineligible as a result of conviction on multiple counts in a single trial and relating to the same set of events.

3 – Scheduled offences

These offences, listed in Schedule 1 of the Criminal Records Act, currently appear to be limited to offences with a sexual component. Offences can be added or removed from the Schedule by order of the Governor in Council. Persons convicted of offences listed in Schedule 1 of the Act are not eligible for a pardon unless the Board is satisfied that:

(a) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;

(b) the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and

(c) the person was less than five years older than the victim.

Foreign Pardon

The Federal Court of Appeal has addressed the issue of foreign pardons in a number of cases. As the Court said in Burgon:

Unless there is some valid basis for deciding otherwise, therefore, the legislation of countries similar to ours, especially when their aims are identical, ought to be

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s. 4(5).
accorded respect. While I certainly agree with Justice Bora Laskin that the law of another country cannot be "controlling in relation to an inquiry about criminal convictions to determine whether immigration to Canada should be permitted", [...] we should recognize the laws of other countries which are based on similar foundations to ours, unless there is a solid rationale for departing therefrom. 29

The Court in Saini reviewed the jurisprudence and summarized the test for recognizing the effect of a foreign pardon under IRPA:

(1) the foreign legal system as a whole must be similar to that of Canada,
(2) the aim, content and effect of the specific foreign law must be similar to Canadian law, and
(3) there must be no valid reason not to recognize the effect of the foreign law. 30

Saini had been convicted of hijacking an airliner but was granted a pardon by the president of Pakistan. The Court examined in more detail the factors set out above. With respect to the first factor, the Court made it clear that there must be more than superficial similarity:

This first requirement is that the two legal systems are similar. [...] The systems must be "similar," not just "somewhat similar." There is a substantial difference between the two tests; it is not a trivial distinction. Of course, that does not mean that the two systems must be identical, for no two legal systems are. It does require, however, that there be a strong resemblance in the structure, history, philosophy and operation of the two systems before its law will be given recognition in this context.

The Court then went on to break down the second factor into three elements:

We must first explore the similarity of the aim and rationale of Canadian law to the foreign law respecting pardons. It seems clear that the aims of the Canadian laws are to eliminate the potential future effects of convictions. Although it may be that the goals and rationale for pardoning provisions around the world are similar, there must be evidence of that adduced.

Second, we must address the content of Canadian laws as compared to the foreign law regarding pardons, which includes the process as well as the factual basis upon which it may be granted.

Third, we must explore the effect of a pardon in Canada as compared to the effect of the foreign pardon.

The Court ultimately found that there was a good reason not to recognize the foreign pardon in Saini given the gravity of the underlying offence.

To better understand the application of some of the other criteria, it is helpful to look at the decisions of the Federal Court in Lui 31 and Kan 32, both of which dealt with the equivalency of the Hong Kong Rehabilitation of Offenders Ordinance. As the Court found in Lui:

30 Saini v. Canada (Minister of Citizenship & Immigration) 2001 FCA 311
31 Lui v. Canada (Minister of Citizenship & Immigration) [1997] F.C.J. No. 1029
The exception of particular relevance in this case contained in paragraph 3(1)(c):

3(1) Nothing in section 2 shall affect – [...] 

(c) the operation of any law under which the individual is subject to any disqualification, disability, prohibition or other penalty.

As I understand paragraph 3(1)(c), for purposes of any law under which an individual may be subject to a disqualification to which the conviction is relevant, subsection 2(1) does not operate. In other words, the conviction is not to be treated as spent with respect of the operation of a law providing for a disqualification as a result of the conviction. That is quite different than paragraph 5(b) of the Criminal Records Act which removes any disqualification under any Act of Parliament subject only to the few exceptions to which I have referred.

The Rehabilitation of Offenders Act in the United Kingdom, on the other hand, has been found to be the equivalent of a Canadian pardon33.

Given the substantial changes to the pardon regime in Canada, some of these previous decisions and equivalencies may well need to be revisited. Given that record suspensions are more onerous to obtain and have more limited effect, the comparison with various other foreign relief mechanisms may be substantially different than under the previous pardon system.

Rehabilitation

Section 36(3)(c) of IRPA and sections 17 and 18 of the IRPR set out the criteria for deemed rehabilitation and eligibility periods to apply for rehabilitation. Once rehabilitation is granted, it will not be affected by the commission of subsequent offences or by subsequent convictions. Deemed rehabilitation, on the other hand, will no longer be effective if the conditions precedent no longer apply.

Persons convicted of offence described in 36(1)(b) and (2)(b) are eligible to apply for rehabilitation five years after the completion of sentence. Persons who committed offences described in 36(1)(c) and (2)(c) are eligible to apply five years after the commission of the offence in question.

Individuals may be deemed rehabilitated:

- 10 years after completion of sentence if convicted of a single foreign offence equivalent to an indictable offence in Canada
- 10 years after the commission of a single foreign offence equivalent to an indictable offence in Canada
- 5 years after completion of sentence if convicted of two foreign offences which would be the equivalent to summary offences in Canada
- 5 years after completion of sentence if convicted of two offences in Canada which can only be proceeded with summarily

The regulations set out in detail the criteria that must be met in each of the circumstances above, but if the individual has been of good conduct the criteria in question will have been met.

**Removal Order Appeals**

The Immigration Appeal Division has the power to stay a removal order on humanitarian and compassionate grounds, which is generally the only recourse which would allow permanent residents caught by s.36(1)(a) to remain in Canada. Loss of the right of appeal through a sentence of two years or more will often result in the deportation from Canada of a permanent resident.

It is helpful to understand a little bit about the process at a removal order appeal before the Immigration Appeal Division. In exercising its equitable jurisdiction to stay removal orders on humanitarian and compassionate grounds, the Board will be guided by the following factors in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4:

- seriousness of the offence or offences leading to the deportation
- possibility of rehabilitation
- length of time spent in Canada and the degree to which the appellant is established;
- family in Canada and the dislocation to that family that deportation of the appellant would cause;
- support available for the appellant not only within the family but also within the community
- degree of hardship that would be caused to the appellant by his return to his country of nationality.

A stay of removal with conditions is a common result in a removal order appeal for criminality when the appeal is not dismissed. Any conviction under 36(1) during the time of the stay will automatically terminate the stay, even if the underlying conduct took place before the appeal.

Bill C-43, which at the time of writing is before the Senate, proposes to fundamentally change access to the IAD for criminality appeals. As set out above, the threshold for loss of appeal rights for in-Canada convictions will be lowered from 2 years of imprisonment to 6 months. With respect to inadmissibility for a foreign conviction under 36(1)(b) or committing an offence under 36(1)(c) there will no longer be any appeal rights at all. The previous eligibility criteria will only apply to those whose cases have been referred to the IRB under s.44(2) at the time the new law comes into force.