Can a criminal conviction make your client inadmissible for residency/citizenship?

Where a client charged with a serious crime is a non-citizen of Canada and is hoping to obtain resident status, criminal lawyers should be aware that recent changes to the *Immigration and Refugee Protection Act* (IRPA) raise special plea and sentencing considerations.

The *Faster Removal of Foreign Criminals Act*
On June 19, 2013, amendments to the IRPA made by Bill C-43, the *Faster Removal of Foreign Criminals Act*, came into force. Among other things, the amendments render inadmissible – without right of appeal – permanent residency applicants who have received a six-month custody sentence for an offence with a maximum 10-year penalty, or a sentence longer than six months for an offence with a maximum penalty less than 10 years.

How does it happen?
Convictions that meet these criteria typically come to the attention of the Minister of Immigration via an inadmissibility report (also known as an "A44 report"). These reports can be prepared and submitted to the Minister for a variety of reasons, including where the person who is the subject of the report has been convicted of a crime. In certain non-criminal cases, the Ministry's issuance of an A44 report is discretionary; however, where an A44 report is issued in response to "serious criminality" as defined by the *IRPA*, the Ministry considers reporting officers' discretion to be very limited. A non-citizen who is the subject of an inadmissibility report may face a removal order with no option to appeal.

As currently drafted, the legislation permits an inadmissibility report to be submitted with respect to a person who was convicted BEFORE the amendments came into force; in other words, the immigration implications of six-month-plus sentences are retroactive. Lawyers should also be aware that time spent in custody prior to conviction, when taken into account in sentencing as time served, counts toward the six-month sentence that triggers an inadmissibility report.

What does this mean for criminal lawyers?
Taking into account each client's citizenship and/or residency status before a plea is entered or plea and/or sentence negotiations with the Crown are commenced gives the lawyer an opportunity to secure a sentence that does not trigger an inadmissibility report. This is an important opportunity, because a lawyer who fails to address the potential immigration consequences of a client's conviction could be exposed to a claim.

What should criminal lawyers do?
Consider addressing immigration at the initial retainer meeting. When checking identification and recording client profile details, as required by the Law Society of Upper Canada's By-Law 7.1, identify the client's citizenship and residency. If the client

is not a Canadian citizen, make a prominent note in the file so this can be addressed as required throughout the file process.

Early identification is key
This conversation between lawyer and client should occur early enough to allow the client to reflect carefully about the plea decision, and if necessary, an adjournment should be obtained to eliminate any plea pressure and permit the client the ability to seek out immigration advice.

Recommend immigration law advice
Ideally, all non-citizen clients at risk of being subject to removal orders should receive advice on immigration consequences from an immigration lawyer prior to entering a plea. Clients who decline the opportunity to seek this advice should be advised of the potential immigration consequences by the criminal lawyer. One should consider obtaining a signed acknowledgment that the issue was brought to the client's attention and the client declined the opportunity to seek immigration advice and was made aware of collateral immigration consequences.

Document plea advice and instructions
Not all lawyers document plea advice and instructions. While the rate of claims in criminal law is lower than in some other areas of practice, one of the most common causes of claims is poor communication with the client about the consequences of a plea. There have already been several criminal law claims (not all relating to pleas or immigration consequences) reported to LAWPRO this spring. Disputes over what plea advice was given, what instructions were received, and allegations that the consequences of the plea were not explained lead, year after year, to claims against criminal lawyers. These cases have the potential to become credibility contests, which often favour the client when the lawyer lacks written documentation of instructions and advice.

Some lawyers who document advice and instructions use checklists to assist them in remembering conversation points. For instance, during a plea conversation, it will often be appropriate to cover the potential impact of a conviction on the client's ability to travel internationally for pleasure, employment or business; to work with vulnerable populations (such as children, seniors, or people with cognitive impairments); or to obtain permanent resident status or citizenship. A checklist used for this purpose could even be provided to the client for signature, as a way of obtaining the client's acknowledgment of having received the advice and being made aware of the collateral immigration consequences. If the situation permits, consider confirming the advice and any instructions in writing with the client.

Implications for pleading and sentence submissions
Understanding the implications of the IRPA changes is equally important when negotiating with the Crown, in case there is an option for the client to plead guilty to a lesser offence, and/or for counsel to develop a joint sentencing submission. Raising immigration issues at an early stage with the Crown may assist with negotiations.

Finally, it is useful to be aware that judges are entitled to take immigration implications into account when imposing sentences, so that you can prepare an appropriate argument ahead of time. While the decision in *R. v. Hoang Anh Pham*, 2013 SCC 15 suggested that a trial judge's unawareness of immigration implications is a factor that can be considered in an appeal of a sentence, *Pham* narrowed the scope of appellate tinkering. The Court in *Pham* stated:

> The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from statutory scheme or from legislation, thus circumventing Parliament's will.
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> These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

Further, the *Pham* decision was released *prior* to the coming into force of the Bill C-43 amendments. A stated objective of the new provisions was a stricter approach to protecting national security. With the statements made in *Pham* and the subsequent changes to the legislation, appellate courts could be less willing to reduce sentences to avoid collateral immigration consequences. This makes it more important than ever to consider immigration consequences when making plea and sentencing decisions at trial.

Criminal lawyers are not immune to professional liability claims. Familiarizing yourself with the Bill C-43 amendments to the IRPA and taking steps such as confirming advice in writing can help keep you in the clear.

Katie James is claims counsel, and Nora Rock is corporate writer and policy analyst at LAWPRO.