

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)**

BETWEEN:

HOANG ANH PHAM

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

APPELLANT'S FACTUM

Rule 42 of the Rules of the Supreme Court of Canada

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The purpose of criminal law and of sentencing and dispositions are closely tied together. Unless we know what the purposes of the criminal law are, or ought to be, we will not know how to formulate a consistent and rational sentencing policy. *How a society defines those purposes and aims tells us a great deal about the kind of people who live in that society and what their values are.* [Emphasis added]

Law Reform Commission,
“Studies on Sentencing: Working Paper #3”
(Ottawa: Information Canada, 1974)

PART I - OVERVIEW AND FACTS

A. Overview

1. How should criminal courts deal with “unintended” or “collateral” consequences of sentencing that results from the interaction between the sentence imposed and other statutory regimes? Should a court ignore the severe consequences that might flow from a sentence when imposing a sentence within the recognized range or tariff for the particular offence? Can a sentencing judge or an appellate court determine that the “unintended” or “collateral” consequences are deserved by the offender and refuse to impose an otherwise fit sentence that would avoid the “collateral” consequence? Similarly, can a sentencing judge or an appellate court impose a sentence for the purpose of avoiding a “knock on” consequence outside the criminal justice sphere? Put simply, and to paraphrase the Law Reform Commission, what kind of people are we and what are our values? These questions drive this appeal.

2. This Appeal presents this Court with the opportunity to provide guidance on the interplay between sentencing for criminal offences and consequences incurred by an offender under the *Immigration and Refugee Protection Act*¹ (“IRPA”).

3. The concerns raised in this appeal are not about “foreigners”. Rather, these questions apply to refugees and permanent residents of Canada who have deep roots in this country and are very much part of its fabric. By virtue of possible changes to the *IRPA* proposed by Bill

¹ R.S.C. 2001, c.27.

C-43, an Act for the “*Faster Removal of Foreign Criminals*”², the issues raised in this appeal will affect many residents who are facing the possibility of incarceration, whether pre-trial or after conviction, of six months or more.

4. It is the Appellant’s position that a principled approach to the issues raised in this appeal requires that the “collateral” consequences of a sentence, even when these fall outside the criminal law domain, form part of the web of personal circumstances essential to the determination of a fit sentence for an individual. To ignore a collateral consequence as significant as deportation would offend the fundamental principle of sentencing – proportionality.

B. The Facts Underlying the Convictions

5. The Appellant and a co-accused, Thai Quoc Ly (Ly), were convicted after trial in the Provincial Court of Alberta of producing and possessing cannabis marihuana for the purpose of trafficking, contrary to sections 7(1) and 5(2) of the *Controlled Drugs and Substances Act*³ (“CDSA”). They were found not guilty of theft electricity contrary to section 326(1)(a) and theft of water contrary to section 334(b) of the *Criminal Code*.⁴

6. The charges related to their occupancy of a residence that contained 591 growing marijuana plants and 128.6 grams of dried marijuana. The marihuana grow operation in the basement was discovered when the police executed a search warrant at a two-storey residence in Calgary. The Appellant answered the door while Ly was brushing his teeth.⁵

7. The co-accused Ly explained at the trial that he and the Appellant flew to Calgary from Toronto three months earlier to find work. Ly arrived with two sets of clothes and less than \$500. He usually worked in construction. The Appellant did woodworking in Toronto.

² The Honourable Jason Keeney, Minister of Citizenship, Immigration and Multiculturalism, introduced the *Faster Removal of Foreign Criminals Act* (Bill C-43) on June 20th, 2012.

³ S.C. 1996, c.19

⁴ Reasons for Judgment of Barley J., *Appellant’s Record*, Tab 2, p.2-3, 9.

⁵ Reasons for Judgment of Barley J., *Appellant’s Record*, Tab 2, p.3.

They hoped to find construction work in Calgary, but were willing to take any job. They went out and looked for work every day, but were not successful. They had arranged to stay with the brother and sister-in-law of a friend from Toronto and their child, but were feeling uncomfortable staying there and contributing nothing.⁶

8. Approximately a month before their arrest, they met two strangers, Duc and Minh, outside a supermarket in Chinatown, who offered Ly and the Appellant a place to stay without cost until they found work. They moved into the house and were arrested less than three weeks later. They had a set of keys and were told by Duc and Minh not to let any strangers in the house. They were told not go into the basement and that it was locked. Duc and Minh came to the house for several hours every day at around 5 pm; they spent their time in the basement, occasionally putting bags upstairs and often bringing bags into the house. The trial judge ultimately found that the Appellant and Ly were willfully blind or were parties to the offences as the “door-keepers” to the illegal marihuana grow operation. While he was skeptical of Ly’s testimony, the trial judge did not reject it.⁷

C. The Sentencing

9. Pursuant to a joint submission, the Appellant was sentenced to two years incarceration. Ly, who had no criminal record, was sentenced to two years less a day and permitted to serve it as a conditional sentence. The Appellant had a modest dated record consisting of convictions in Vancouver in 2000 of failing to attend court, for which he was sentence to just one day in goal, and of possession of, and trafficking in, a controlled substance, for which he was given a three month conditional sentence on each charge concurrent.⁸

10. The Appellant’s presentence report showed that he was a 29 year old man born in Vietnam. He and his sister were sponsored by his father to come to Canada when he was 16

⁶ Reasons for Judgment of Barley J., *Appellant’s Record*, Tab 2, p. 4-5; Transcript of Trial Proceedings, *Appellant’s Record*, Tab 14, p.169 to p.221

⁷ Reasons for Judgment of Barley J., *Appellant’s Record*, Tab 2, p.5-8; Transcript of Trial Proceedings, *Appellant’s Record*, Tab 14, p.169 to p.221

⁸ Criminal Record, *Appellant’s Record*, Tab 13, p.86. Transcript of Sentencing Proceedings, *Appellant’s Record*, Tab 11, p.65 to 71.

years old. However, his relationship with his stepmother was strained and he left his father's home at the age of 17, travelled to British Columbia and led a transient and homeless lifestyle. There he incurred his previous convictions. He returned to Mississauga, Ontario in 2001 after serving his sentence and had lived there ever since. The Appellant has a grade 9 education from Vietnam and does not speak English. At the time of the PSR, he was employed as a machine operator in a carpet mill. There is no suggestion of any drug or alcohol abuse. He indicated remorse and accepted responsibility for the offences. He was compliant and completed the period of community supervision for his prior offences without incident.⁹

11. One lawyer acted for both accused at sentencing. Neither he nor the Crown made submissions on the immigration implications of a two year (as distinct from a two year less a day) sentence nor does it appear that the trial judge was aware of the those implications. There was no suggestion that the idea of stripping the Appellant of the right of appeal to Immigration Appeal Division was an intended part of the joint submission or of the sentence. The proposal that the Appellant be given a two year sentence concurrent on each count was accepted without comment or Reasons by the trial judge.¹⁰

D. The Alberta Court of Appeal

12. The Appellant appealed the sentence to the Alberta Court of Appeal, seeking to reduce by *one day* the sentence imposed. It was not disputed on appeal that the result of the sentence of two years under the *Immigration and Refugee Protection Act* was that the Appellant would lose the right to appeal a deportation order against him.

13. In the Alberta Court of Appeal, the Crown **conceded** that the appeal should be allowed and the sentence varied to a sentence of 2 years less a day. The Crown conceded that the difference of one day is negligible and still reflects the intent of the joint submission and the decision of the sentencing judge. The Crown opposed any further reduction of the sentence.

⁹ Pre-sentence Report, *Appellant's Record*, Tab 12, p.80-85.

¹⁰ Transcript of Sentencing Proceedings, *Appellant's Record*, Tab 11, p.65 to p.71.

E. The Decision of the Alberta Court of Appeal

14. Despite the Crown's concession, and departing from its own jurisprudence, the majority of the Alberta Court of Appeal refused to vary the Appellant's sentence by one day. On behalf of the majority, Mr. Justice McDonald concluded that the Appellant had "abused the hospitality" afforded to him in Canada and the plain and unequivocal language of the *IRPA* could not amount to "an unintended consequence of great significance" such as to warrant even minor variation as to sentence that the Crown was prepared to concede.¹¹

15. Mr. Justice McDonald noted (in error) that in two prior cases where the Court of Appeal did grant the exact type of variation requested by the Applicant, *R. v. Dhura*¹², and *R. v. Barkza*¹³, the Appellants did not have criminal records.¹⁴

16. In dissent, Mr. Justice Martin wrote that he would allow the variation in sentence with the caveat that in future cases, this relief "will not be there simply for the asking". He noted that he agreed with the majority that those with a criminal record who are sentenced to imprisonment for two years or more should not usually have their sentence reduced, even by a day, simply to enable them the right to appeal a deportation order. However, Mr. Justice Martin recognized that in this case, had counsel been aware of the collateral consequence flowing from a two year sentence, a joint submission of two years less one day would have been agreed to.¹⁵

¹¹ Decision of the Alberta Court of Appeal, *Appellant's Record*, Tab 4, p.17, para.15 to p.19, para.26.

¹² 2011 ABCA 165

¹³ 2011 ABCA 273

¹⁴ The Court was wrong in this regard. After the hearing of the appeal but prior to the judgment, counsel for the Appellant in the Alberta Court of Appeal submitted supplementary written materials setting out the criminal records of Mr. Dhura, Mr. Barkza and the appellants in the other cases referred to on appeal in that Court.

¹⁵ Decision of the Alberta Court of Appeal, *Appellant's Record*, Tab 4, p.20, para. 29 to p.21, para. 33.

PART II - POINTS IN ISSUE

17. The following issues arise for determination on this Appeal:

Issue One: How should a criminal (or appellate) court consider the “unintended” or “collateral” consequences of a criminal sentence, particularly consequences relating to the immigration status of an offender?

Issue Two: Did the Court of Appeal of Alberta err in principle by refusing to vary the Appellant’s sentence by one day in order to preserve his right to appeal an immigration deportation order?

18. The fundamental principles of sentencing require that a sentencing court consider the impact of the conviction and sentence on that individual *as a whole*. Proportionality means that the punishment must fit the offence and the offender. The impact of a criminal conviction and sentence, particularly on the immigration status of an individual, is relevant in determining a fit sentence for that individual. While it cannot justify the imposition of a manifestly unfit sentence, it can and should affect where along a range an appropriate sentence will fall.

19. Where the immigration consequences are unknown or unappreciated at sentencing, it falls to appellate courts to intervene to prevent a potential injustice. Even where the initial sentence is within the accepted range, a *de minimus* variation may be required on appeal in order to give effect to the intention of the parties at sentencing and the sentencing judge. In some circumstances, the impact of deportation and the loss of the right to appeal a removal order under the *IRPA* will render the sentence disproportionate to the gravity of the offence and the moral blameworthiness of the offender, so that a variation of the sentence outside the *de minimus* range will be warranted. Ultimately, one of the goals of the criminal sentencing regime is to ensure that the sentence, including its collateral effects, remains proportionate to the crime and the circumstances of the offender so that the sentence is not excessive or arbitrary.

20. In this case, the Alberta Court of Appeal's refusal to vary the sentence by *one day* is wrong in principle and the result is fundamentally unfair. The decision of the Alberta Court of Appeal in this case stands for the proposition that it is *wrong* to consider the unintended or collateral consequences when sentencing an offender. The effect of the decision goes further, and creates a separate class of offenders, non-citizens, for whom the usual principles of sentencing (proportionality and restraint) do not apply. Moreover, the Alberta Court of Appeal, in a very real way, usurped the function of the immigration authorities and determined that, by reason of his prior criminal record, the Applicant did not deserve to opportunity to appeal a deportation order and had no right to stay in Canada.

PART III - ARGUMENT

ISSUE ONE: How should a criminal (or appellate) court consider the “unintended” or “collateral” consequences of a criminal sentence, particularly consequences relating to the immigration status of an offender?

A. Overview

21. The *Immigration and Refugee Protection Act* (“IRPA”) links findings of inadmissibility for non-citizens to the outcomes of criminal prosecutions. Under the present regime, critical procedural rights within the IRPA scheme are extinguished if an offender is sentenced to a term of two years or more. The elimination of the right to appeal to the Immigration Appeal Division from removal order is tantamount to making such a sentence a *de facto* removal order. For offenders who are permanent residents, who have lived much of their lives in this country, this may be the most severe consequence of their interaction with the criminal justice system. The settled foundational principles of sentencing – proportionality and restraint – demand that a sentencing court take such consequences into account when locating a sentence within the appropriate range. If a sentence within the appropriate range would *avoid* such profound indirect consequences then *that* is the *fit* sentence.

B. The Current Legislative Framework Under The *Immigration and Refugee Protection Act* For Inadmissibility and Appeals

22. Sections 33 to 37 of the *Immigration and Refugee Protection Act*¹⁶ set out the basis of inadmissibility of permanent residents and foreign nationals. There are a number of categories of inadmissibility including security (s.34), human or international rights violations (s.35), criminality (s.36) and organized criminality (s.37).¹⁷ Section 36 of the IRPA states:

s.36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

¹⁶ S.C. 2001, c.27

¹⁷ Additional categories for which a person may be barred from entering or remaining in Canada include health grounds (s.38), financial reasons (s.39), misrepresentation (s.40), non-compliance (s.41) and inadmissible family member (s.42); M. Bellissimo and L.R. Genova, *Immigration Criminality and Inadmissibility* (Toronto: Carswell, 2009) at p.1-9.

(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;

(b) 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.¹⁸

s.36(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 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 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.

23. The definition of “serious criminality” under s.36 of the *IRPA* relates to crimes punished in Canada by a term of imprisonment of at least six months and includes all time credited or imposed in relation to a sentence. Hybrid offences are deemed to be indictable even if the Crown has elected to proceed summarily.¹⁹ Section 36(2) creates an additional standard for “serious criminality” for foreign nationals (those with no legal status in Canada) and includes convictions for any indictable offence in Canada or of any two offences under

¹⁸ *IRPA*, s.36(1)(a)-(c).

¹⁹ *IRPA*, s.36(3)(a)

any Act of Parliament²⁰ not arising out of a single occurrence as well as convictions or offences outside Canada.

24. Under s. 64 of the *IRPA* a permanent resident who is convicted of a criminal offence punishable by at least ten years imprisonment, and sentenced to a term of imprisonment of two years or more, has no right to appeal a removal order made against him or her. Section 64 of the *IRPA* provides that:

s.64(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that punished in Canada by a term of imprisonment of at least two years.

25. Release on parole in less than two years provides no relief from the deportation process and does not restore the appeal rights under s.64.²¹ Pre-trial custody is included in the calculation, so if the sentence imposed is less than two years but the punishment included credit for pre-trial custody which brings the total to two years, *IRPA* s.64(2) applies and there is no right of appeal a removal order.²² Only if the sentence imposed is less than two years, may the Immigration Appeal Division exercise its discretion to grant relief based on humanitarian and compassionate grounds.²³ The current *IRPA* does not distinguish between serious criminals from those who have erred but, if given the chance, may become or are currently law abiding and productive members of Canadian society.²⁴

26. Appellate courts have recognized that the other measures set out in the *IRPA* are not analogous to this special right of appeal and therefore cannot compensate for the loss of such

²⁰ Regulation 19 of the *IRPA* prescribes the following Acts of Parliament a conviction under which is grounds for denying entry or removing a foreign national: *Criminal Code*, *IRPA*, *Firearms Act*, *Customs Act* and *CDSA*.

²¹ *Martin v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 347 (F.C.A.)

²² *Ariri v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2009 FC 834 (F.C.).

²³ *IRPA*, supra, ss.36, 44, 63, 64, 68.

²⁴ M. Bellissimo and L.R. Genova, *Immigration Criminality and Inadmissibility* (Toronto: Carswell, 2009) at p.1-1.

a right.²⁵ The Federal Court does not become an appellate court when it exercises its judicial review jurisdiction. The discretionary power conferred on the Minister of Citizenship and Immigration in sections 25 and 112 *IRPA* does not compensate for the loss of a right of appeal before a body such as the Immigration Appeal Division, which may, in the appeal, take into consideration other aspects of the removal decision in addition to humanitarian grounds.

27. In *Immigration, Criminality and Inadmissibility*, Mario Bellissimo and Louie Genova note that:

Although at first blush the proposition that a country should be less tolerant of criminality is laudable and of key importance to society building, the immigration scheme to be effective in promoting many of its core objectives (facilitation, commerce, family reunification, humanitarian and *Charter* principles) must be responsive to the complex web of nuances applicants with criminality present upon seeking to remain or enter Canada. **Thus it is the shades of grey amidst these two ends that defines much of this area of law.**²⁶ [Emphasis added]

The authors note that under the current *IRPA* (which has been law for the past decade), as compared to the former *Immigration Act* (1976-2002), appeal rights are far more limited and there is less tolerance for criminality. Under the former *Immigration Act*, permanent refugees and conventional refugees had a right to a full appeal hearing in equity before an independent tribunal and discretion vested in certain officers not to order removal. The trend towards automatic removal of individuals continues with the introduction of Bill C-43.

C. Proposed Amendments to *IRPA* Put Forward In Bill C-43:

28. The proposed amendments to the *IRPA* contained in Bill C-43²⁷ are not the subject of this appeal. However, the proposed elimination of humanitarian and compassionate relief for those deemed “inadmissible” for security or “serious criminality” in that Act is significant to this case. Bill C-43 brings with it, amongst a number of other significant changes, severe curtailing of Ministerial discretion, the potential for virtually automatic deportation of those

²⁵ *R. v. Q.A.M.*, 2005 BCCA 615 at para. 30; *R. v. Guzman*, *R. v. Belance*, *R. v. Laplante* 2011 QCCA 136 at para. 49-50

²⁶ M. Bellissimo and L.R. Genova, *Immigration Criminality and Inadmissibility* (Toronto: Carswell, 2009) at 1-3.

²⁷ The Honourable Jason Keeney, Minister of Citizenship, Immigration and Multiculturalism, introduced the Faster Removal of Foreign Criminals Act (Bill C-43) on June 20th, 2012.

convicted of criminal offences punishable by up to 10 years imprisonment and sentenced to incarceration of *six months*.²⁸ Permanent residents who are sentenced to a period of incarceration of more than six months would lose the right to appeal the deportation to the Immigration Appeal Division. There is no distinction between violent or non-violent crimes. There is also no distinction between pre-trial custody and post conviction sentence. The removal of these permanent residents from Canada is intended to be largely without recourse. Should Bill C-43 become law, the principles set out by this Court in the current appeal will be applied by sentencing and appellate courts in sentencing those individuals as well.

D. Collateral Consequences Generally

29. There are any number of consequences, which sit outside the criminal law that may flow from conviction.²⁹ In Canada, collateral consequences may include travel and employment restrictions, provincial registration and reporting for sexual offences, license suspension, disadvantage in family law proceedings and civil liability. The loss of a job or career opportunities, repercussions to one's family, the loss of licenses to practice regulated activities or financial consequences through penalties and fines under distinct regimes are, at the criminal sentencing stage, often considered as part of the circumstances of an offender.³⁰ Where the collateral consequence of the conviction, such as the loss of a job or family, does not flow inexorably from the crime (for example, a breach of trust or the abuse of one's

²⁸ Other potential changes proposed in Bill C-43 include: loss of the right to appeal to the Immigration Appeal Division by those who have a foreign conviction for an offence carrying a maximum term of imprisonment of ten years; loss of the right to apply for relief under humanitarian and compassionate considerations by individuals inadmissible on grounds of security, human and international right violation or organized criminality; foreign nationals who have a family member who is inadmissible on grounds of security, human and international right violation or organized criminality may be inadmissible and a new discretion vested in the Minister of Citizenship and Immigration to deny temporary resident status for up to three years on the basis of "public policy considerations". This list of proposed changes is not exhaustive.

²⁹ The National Institute of Justice in the United States collected and studied collateral consequences in all U.S. jurisdictions, and the results are available through an interactive website at www.abacollateralconsequences.org. In the U.S., additional legal penalties attached to convictions are broader and more pervasive than elsewhere in the common law world. These consequences are often "hidden" during the criminal process because they are considered civil. Some of these penalties include ineligibility for public benefits, public housing, student loans, forms of employment and civic exclusion such as the ineligibility for jury duty and disenfranchisement. See M. Pinard, "Collateral Consequences of Criminal Convictions: Confronting Issues on Race and Dignity" 2010 NYU Law Review. Generally, consequences to immigration such as deportation in the United States are triggered by conviction for certain offences rather than sentence. See A. Menes, "Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment" (Fall, 2012) 14 The Scholar (St. Mary's Law Review on Minority Issues) 767

³⁰ *R. v. Bunn* 2000 SCC 9; *R. v. Ens* 2011 MBQB 301; *R. v. Williams* 2007 Carswell Ont. 2559; *R. v. Campbell*, [1992] P.E.I.J. No. 88.

position to commit the offence), these types of collateral consequences may be considered in mitigation of sentence.³¹

E. A Principled Sentencing Approach to Consequences to Immigration

i) Proportionality, Restraint and Sentencing:

30. Proportionality is the fundamental principle of sentencing in s.718.1 of the *Criminal Code*, which states:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Whatever other ends a sentence may hope to achieve, it must first and foremost fit the specific crime and the specific offender. The objectives and principles of sentencing codified in sections 718 to 718.2 of the *Criminal Code* consider the fundamental purpose of sentencing as that of contributing to “respect for the law and the maintenance of a just, peaceful and safe society”. This purpose is met by the imposition of “just sanctions” that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.³²

31. In *R. v. Nasogluak*³³, Justice Lebel wrote for this Court that:

The objectives of sentencing are given a sharper focus in s.718.1, which mandates that a sentence be “proportionate to the gravity of the offence and the degree of responsibility of the offender”. Thus, whatever weight a judge may wish to accord to the objectives listed above, ***the resulting sentence must respect the fundamental principle of proportionality***. Section 718.1 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to

³¹ *R. v. W.(J.J.)* 2012 N.S.J. 522 at para. 39-40; *R. v. Heatherington* 2005 ABCA 393 (Alta. C.A.); *R. v. Zenari* 2012 ABCA 279 (Alta C.A.); *Contra R. v. Bonamy*, 1999 BCCA 620; A. Manson et al., *Sentencing and Penal Policy in Canada*, 2nd ed. (Toronto: Edmond Montgomery Publications Limited, 2008) at 124; C. Ruby et al., *Sentencing*, 8th ed. (Markham: Lexis Nexis Canada Inc., 2012) at para. 5.230-5.231.

³² Section 718 of the *Criminal Code*, R.S.C. 1985; See Clayton C. Ruby et al., *Sentencing*, 8th ed. (Markham: LexisNexis Canada Inc., 2012) at p.1.

³³ [2010] S.C.J. No. 6

consider “all available sanctions other than imprisonment that are reasonable in the circumstances”, with particular attention paid to the circumstances of aboriginal offenders.³⁴ [Emphasis added.]

The principle of proportionality is central to the sentencing process³⁵. This emphasis was not born of the 1996 amendments to the *Criminal Code* but, rather, reflects its long history as a guiding principle in sentencing.³⁶ It has a constitutional dimension, in that s.12 of the *Charter* forbids the imposition of a grossly disproportionate punishment that would outrage society’s standards of decency.³⁷

32. Proportionality and restraint requires that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the “just deserts” philosophy of sentencing which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they have caused.³⁸

33. In *R. v. Priest*, the Court of Appeal for Ontario said:

The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. *Careful adherence to the proportionality principles ensures that this offender is not unjustly dealt with for the sake of the common good.*³⁹

“Collateral” and “unintended” consequences of a sentence must be considered in assessing the proportionality of a sentence. Where a sentence lacks proportionality, it is unnecessarily punitive. It becomes arbitrary. Arbitrariness in sentencing undermines the rule of law and

³⁴ [2010] S.C.J. No. 6 at para. 39

³⁵ *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12

³⁶ *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.).

³⁷ *R. v. Proulx*, 2000 SCC 5, *R. v. Ipeelee*, 2012 SCC 13

³⁸ *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; Clayton C. Ruby et al., *Sentencing*, 8th ed. (Markham: LexisNexis Canada Inc., 2012) at p.23 to 28.

³⁹ *R. v. Priest*, [1996] O.J. No. 3369, 110 C.C.C. (3d) 289, at pp.297-98, per Rosenberg J.A. (Ont. C.A.)

brings the administration of justice into disrepute.

ii) *The Basis For Including Collateral Circumstances As A Valid Consideration At Sentencing*

34. It is the Appellant's position that where there is a circumstance particular to an offender that renders a sentence especially punitive in its effect, that circumstance is a valid consideration at sentencing of that individual under the *Criminal Code*. To hold otherwise would offend the principle of proportionality in sentencing and potentially run afoul of s.12 of the *Charter of Rights and Freedoms*.

35. This Court has ruled on whether other types of consequences, collateral to the actual length of sentence imposed, are part of the sentencing process. In *R. v. Shropshire*⁴⁰, this Court held that parole ineligibility is part of the total punishment and ought to be considered as part of sentencing. In *R. v. Fice*⁴¹, this Court decided that pre-trial custody ought to be considered part of the total punishment imposed. In *R. Morrissey*⁴², this Court, in upholding the constitutionality of a four year minimum sentence for criminal negligence causing death, held that sentencing principles require the court to appreciate how a sentence will actually be served. The Court suggested that the actual effect of the punishment on the offender, in particular how the offender will be personally affected by the actual punishment imposed, is a valid consideration when assessing the fitness of a sentence.

36. In the companion appeals *R. v. Craig*⁴³, *R. v. Ouellete*⁴⁴ and *R. v. Nguyen*⁴⁵, this Court considered whether forfeiture under s.19.1 of the *CDSA* forms part of the sentencing process under s.718 of the *Criminal Code* or whether it ought to be considered as a separate part of sentencing. Choosing between two interpretative approaches, Justice Abella for the majority was of the view that forfeiture, or the loss of property, under s.19.1 of the *CDSA* must be a separate part of sentencing, rather than an aspect of the global punishment subject to the usual

⁴⁰ [1995] 4 S.C.R. 227

⁴¹ [2005] S.C.J. No 30

⁴² [2000] SCC 39 at para. 41 and 42.

⁴³ 2009 SCC 23

⁴⁴ 2009 SCC 24

⁴⁵ 2009 SCC 25

sentencing principals (proportionality in particular), in order to negate the possibility that loss or retention of liberty would depend on whether property was available for forfeiture. Otherwise, those without property to forfeit would be at greater risk of imprisonment.⁴⁶ The majority of this Court was also of the view that partial forfeiture could be ordered under the provisions at issue, so that proportionality of the penalty could be addressed independently of the sentencing regime set out in s.718 of the *Criminal Code*. Unlike the immigration provisions, under s.19.1(3)⁴⁷ of the *CDSA* it is open to an offender to persuade the court that forfeiture would be disproportionate with regard to relevant criteria. The final determination as to the proportionality of the forfeiture lies within the discretion of the sentencing judge.

37. The consequences of a criminal conviction and sentence must be viewed against the backdrop of the constitutional requirement that the total punishment must not be grossly disproportionate.⁴⁸ Section 12 jurisprudence makes it clear that it is not only the length of sentence (“the legal sanction”), but punishment as a whole that is subject to Charter scrutiny.⁴⁹ The *effect* of state imposed punishment must not be grossly disproportionate to what would have been appropriate. In *R. v. Lyons*⁵⁰, La Forest J. for the Court wrote that:

One must also measure the effect of the sentence actually imposed. If it is grossly disproportionate to what would have been appropriate, then it infringes s.12. ***The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied.*** Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. ***Sometimes it will be the result of the combination of factors, which when considered in isolation, would not in and of themselves amount to gross disproportionality.*** For example, twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement... Lamer J. in *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045

⁴⁶ 2009 SCC 23 at para. 11-13

⁴⁷ Section 19.1(3) of the *CDSA* provides that the court must consider whether “the impact of an order of forfeiture... would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence.” If so, the court “may decide” not to order forfeiture of the property or part of the property.” If the property to be forfeited is a dwelling house, the court is additionally required to take into account the impact of forfeiture of the house on family members. *R. v. Craig, supra*, at para. 26 to 28.

⁴⁸ *Canadian Charter of Rights and Freedoms*, s.12. Section 12 provides that: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

⁴⁹ *R. v. Wust* 2000 SCC 18 at 35-37

⁵⁰ [1987] 2 S.C.R. 309 at para. 41; see also *R. v. Latimer* 2001 SCC 1 para. 73-78.

at pp.1072-1074. [Emphasis added.]

Section 12 of the Charter, as a matter of principle, is concerned with the relation between the effect of and reasons for punishment. Punishment is not the only the number attached to a sentence, but the global impact of that sentence on the individual offender.

38. In *R. v. Wust*⁵¹ this Court considered whether pre-trial custody could reduce a minimum statutory sentence to below the minimum. For the Court, Arbour J. wrote that:

“Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 92, Lamer C.J.; *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 93, per Cory and Iacobucci JJ.”

To avoid the imposition of unfit sentences and give effect to the principle of proportionality, sentencing judges must, in the exercise of their discretion, take into account the total impact of the sentence on an individual. Proportionality requires that punishment inflicted by criminal law on those who are non-citizens and subject to *IRPA* recognize and weigh the consequences flowing to those individuals from *IRPA* at sentencing.

39. The inclusion of immigration consequences in the assessment of a fit criminal sentence is required regardless of the state’s right to deny entry to some and to expel others. The courts have thus far, seen deportation as an administrative function rather than a true penal sanction.⁵² Russell Cohen, in “Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada”, argues that it is difficult not see deportation as a punishment of the highest order:

[20] In practical terms, deportation lies much closer to traditional notions of punishment than to administrative sanction. It is a punishment, though directed at immigrants, that often results in significant hardship and suffering for family members

⁵¹ 2000 SCC 18

⁵² *Khosa v. Canada (Minister of Citizenship and Immigration)* 2009 SCC 12 at para. 56; *Charkoui v. Canada (Citizenship and Immigration)* 2007 SCC 9; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.); *Hurd v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 594 (FCA)

and friends, who may in fact be citizens. In a study of deportation and the immigration power in Australia, David Wood writes that, in some cases, losing the right to live in what has become one's homeland can be a deprivation even more serious than imprisonment. But despite the severity of its impact, deportation is generally over-looked as a serious form of punishment. The reasons for the courts' persistent characterization of deportation as less than serious stems from a number of sources. It is in part rooted in the reluctance of the judiciary to scrutinize executive decisions intimately related to state sovereignty or security. Secondly, deportation has been effectively removed from the reality of criminal punishment where considerably more common law and constitutional protections are engaged. Finally, deportation is often justified on the basis of cost and administrative expedience.

[21] The courts' focus upon classification – visitor, immigrant, citizen – while ignoring the substance of a person's relationship with the country, perpetuates the notion that for certain persons deportation is acceptable treatment. It also lifts from the courts the burden of having to examine precisely what it is at issue in deportation cases, and what effects deportation has on individuals.⁵³

40. Even if something as serious as deportation can be regarded as merely an “administrative consequence”, akin to the loss of a license or job, rather than a true penal sanction, it remains a factor that must be taken into account as part of the criminal sentencing process. This Court has held that it is essential for a sentencing judge to sentence an offender on the basis of the “fullest information possible” concerning the offender if he or she is to “fit the sentence to the offender rather than to the crime.”⁵⁴ Loss of immigration appeal rights or deportation is a significant personal circumstance.

41. Ultimately, sentencing is an individualized process in which the trial judge retains considerable discretion in fashioning a fit sentence.⁵⁵ Whether or not a sentence is disproportionately severe by reason only of the deportation that flows from it will depend on any number of individual factors, including family and business roots, property owned in Canada, length of time in Canada, lack of minor criminal antecedents, low moral

⁵³ R.P. Cohen, “The Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada” (1994) 32 Osgoode Hall L.J. 457 at para. 18 to 22. The author questions the constitutionality of deportation of long-term residents and argues for a constitutionally recognized right to remain.

⁵⁴ *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414 per Dickson J.; *R. v. Angelillo* 2006 SCC 55; *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 75-81.

⁵⁵ *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82

blameworthiness, age and health of the offender, absence of connection to deportation country and potential hardship there.⁵⁶

42. Deportation is a relevant consideration in fashioning a sentence that will be proportionate to the crime and the offender's moral blameworthiness. It would be wrong in principle to exclude immigration consequences from consideration at sentencing. In *R. v. Craig*, Fish J. for the minority cautioned against disregarding punitive effects of forfeiture orders under the *CDSA*, stating the following:

"To blindly disregard the impact of one element of the global punishment provided by law, *forfeiture*, in considering the other, sentence, will otherwise often result in a global punishment that is qualitatively excessive, poorly calibrated to serve the purposes of sentencing, or otherwise unfit."⁵⁷

To disregard the impact of a sentence on an offender's immigration status at the sentencing stage, without another mechanism to measure proportionality at another stage, results in punishments that are excessive, poorly calibrated to serve the purposes of sentencing and otherwise unfit.

iii) What Weight Should Be Placed on Immigration Consequences at Sentencing

43. The effect of a sentence on an offender's immigration status is a relevant factor in sentencing. The question of how much weight this factor is entitled to in the determination of a fit sentence involves balancing of competing legal principles and interests including the need for proportionality and restraint in sentencing, balancing the legislative intention under the immigration regime with the legislative intention expressed by the sentencing provisions of the *Criminal Code* as set out in sentencing provisions, deference to the judicial exercise of discretion in sentencing and the exercise of appellate jurisdiction.

44. It is the Appellant's position that a principled approach to sentencing would see that the consequences of a criminal sentence on an offender's immigration status would be given some weight in recognition of the additional punitive element these consequences carry, but

⁵⁶ M. Bellissimo and L.R. Genova, *Immigration Criminality and Inadmissibility* (Toronto: Carswell, 2009) at p.10-26.

⁵⁷ *R. v. Craig* 2009 SCC 23 at per Fish J. at para. 100-104.

not so much weight as to shift a sentence from an otherwise fit range of sentence. Therefore, it would be wrong in principle to impose a particularly lenient sentence that is clearly unfit in order to avoid the immigration consequences intended by Parliament. It would be equally wrong in principle to impose a sentence that is excessive in order to secure those immigration consequences.

45. Far more delicate balancing is required in cases such as this one, where a small movement along a spectrum of fit dispositions has profound consequences on immigration. In such circumstances, it is respectfully submitted that regard must first be had to proportionality of the total punishment balanced against the moral culpability of the offender and the gravity of the offence. Where appropriate, the criminal court may exercise its discretion and adjust an otherwise fit sentence within a *de minimus* range, and sometimes more, in order that the sentence is ultimately proportionate to the offence and the offender's moral blameworthiness. The sentencing provisions of the *Criminal Code* mandate the exercise of discretion in this way.⁵⁸

a. The Prevailing View:

46. The early view that immigration consequences of sentencing were not within the purview of the criminal courts has changed.⁵⁹ In recent years, courts have accepted that possible immigration and deportation consequences *are* a factor to be considered in sentencing. The shift in immigration legislation towards "automatic" deportation has

⁵⁸ Conversely, the Immigration Appeal Division under *IRPA* has no mandate to consider criminal justice. See *Li v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 992

⁵⁹ Gilles Renaud, in "Deportation and Sentencing: An Overview," in Alan D. Gold Collection of Criminal Law Articles (ADGN/RP -103) Gilles Renaud, O.C.J. (October 23, 2000) observes that historically, past cases involving non-citizen appellants seeking relief from possible or real deportation typically involved minor offences such as shoplifting, and the relief sought was a discharge, so that the offender could escape the consequences of having a criminal record. In some cases, an application to vacate or void a conviction was made on the same basis. Given the broad rights of appeal under the former *Immigration Act*, it is not surprising that those convicted of more serious crimes would exercise the rights of appeal or pursue the other avenues for relief under the immigration route. Although discharges were imposed in a number of cases, the *ratio descendi* of those cases was that the discharge is an exceptional remedy applied in extenuating circumstances, which did not include relief from existing and established application of immigration law. See historical overview in *R. v. Bernard*, [1999] A.J. No. 812 (Q.B.), paras. 22-30; *R. v. Abouabdellah* (1996), 109 C.C.C. (3d) 477 (Que. C.A.), *R. v. Daskalov*, 2011 BCCA 169. See also C. Ruby et al., *Sentencing*, 8th ed. (Markham: LexisNexis Canada Inc., 2012) at p.316-317. Historically, the approach across provinces to whether deportation could mitigate sentence has not been consistent. Whereas some appellate courts would permit the likely deportation of an offender to mitigate sentence or reduce a sentence in order to facilitate deportation, others refused to do so.

triggered a shift in sentencing jurisprudence. The predominant approach since the decision of the Ontario Court of Appeal in *R. v. Hamilton*⁶⁰ has been to give some effect to the consequences of a conviction and sentence on an offender's immigration status without allowing this consideration to take the sentence outside the otherwise appropriate range.

47. In *Hamilton*, the Ontario Court of Appeal held that immigration consequences are a relevant but not determinative consideration on sentence. The court set aside the conditional sentences imposed by Hill J. on two women who had been convicted of importing narcotics into Canada. Doherty J.A. discussed the relevance of immigration consequences in sentencing proceedings as follows:

[156] In the first situation, it is acknowledged that imprisonment is the only appropriate sentence and that deportation from Canada will inevitably follow upon completion of the sentence. In the second situation, it is argued that a certain kind of sentence should be imposed to avoid the risk of deportation from Canada. In the first situation, the certainty of deportation may justify some reduction in the term of imprisonment for purely pragmatic reasons: *R. v. Critton*, [2002] O.J. No. 2594 at paras. 77-86 (Sup. Ct.). In the second situation, the risk of deportation cannot justify a sentence, which is inconsistent with the fundamental purpose and the principles of sentencing identified in the Criminal Code. The sentencing process cannot be used to circumvent the provisions and policies of the Immigration and Refugee Act [*sic*]. *As indicated above, however, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender: R. v. Melo* (1975), 26 C.C.C. (2d) 510 at 516 (Ont. C.A.)

[158] I would not characterize the loss of a potential remedy against a deportation order that might be made a mitigating factor on sentence. *I do think*, however, that in a case like Ms. Mason's *there is room for consideration of the potentially added risk of deportation should the sentence be two years or more*. If a trial judge were to decide that a sentence at or near two years was the appropriate sentence in all the circumstances for Ms. Mason, the trial judge could look at the deportation consequences for Ms. Mason of imposing a sentence of two years less a day as opposed to a sentence of two years. I see this as an example of the human face of the sentencing process. *If the future prospects of an offender in the circumstances of Ms. Mason can be assisted or improved by imposing a sentence of two years less a day rather than two years, it is entirely in keeping with the principles and objectives of sentencing to impose the shorter sentence*. While the assistance afforded to someone like Ms. Mason by the imposition of a sentence of two years less a day rather

⁶⁰ (2004), 186 C.C.C. (3d) 129 (Ont. C.A.)

than two years may be relatively small, there is no countervailing negative impact on broader societal interests occasioned by the imposition of that sentence: see *R. v. Lacroix*, [2003] O.J. No. 2032 (C.A.)⁶¹ [Emphasis added.]

The Court of Appeal decision in *Hamilton* has been widely adopted by other courts of appeal. Deportation is a factor that can be considered in deciding the appropriate sentencing response and tailoring the sentence to best fit the crime and the offender. Where the trial judge's intention is predicated on incorrect or incomplete information, it is not inappropriate for an appellate court to intervene and correct the potential injustice.⁶²

b. Where The Consequences to Immigration Are Not Known or Not Considered at Sentencing:

48. Where the immigration consequences of sentencing are unknown or unappreciated at the time the sentence is imposed, and particularly where they were not brought to the attention of the sentencing judge (as in this case), appellate courts have often been called upon to intervene to ameliorate the potential injustice. In cases involving collateral consequences under the *IRPA*, appellate courts are asked to vary the sentence in order to preserve the appellant's rights to appeal a removal order. Relief in such cases does not exempt appellants from deportation: it merely enables them to apply for a stay or review of an existing deportation order. The intention is to remedy an unforeseen consequence of sentence disproportionate to the penalty imposed.

49. Some appellate courts have adopted an approach that is responsive to the circumstances of immigrants and refugees for whom being involuntarily returned to their country of origin means loss of country, security and family and can be a dangerous, devastating and differential consequence of sentencing as compared with Canadian citizens, making the initial sentence more onerous than intended. However, the approach and the principles developed have not been consistent.

⁶¹ *R. v. Hamilton*, [2004] O.J. No. 3252, 186 C.C.C. (3d) 129 at para. 156 and 158 (Ont. C.A.)

⁶² *R. v. Lakatos* 2011 ONCA 318 at para. 23.

50. There appear to have developed two distinct approaches by appellate courts in Canada as to how to treat the unintended or collateral consequence of a sentence on review. The first approach is to allow a variation of the sentence within a *de minimus* range. This is particularly so when the consequences on the offender's immigration status were not known or not brought to the attention of the sentencing judge, but not always so. The second approach holds the appellant to a much higher standard and requires the appellant to demonstrate that the sentence imposed is otherwise demonstrably unfit before a variation, even a *de minimus* variation of one day, will be permitted. In cases where a variation is outside the *de minimus* range, for the most part appellate decisions turn on the ultimate fitness of the sentence.

c. De Minimus Variations:

51. In keeping with the decision in *R. v. Hamilton*, numerous appellate decisions have held that immigration consequences *are* a valid consideration in sentencing, but that these "collateral" consequences cannot take a sentence out of an otherwise appropriate range.⁶³ A sentencing judge may consider the immigration consequences to ensure that a sentence, otherwise within the range, does not create serious and unintended immigration consequences that would result in a disproportionate sentence for the circumstances of the offence and the offender. Recognizing that a fit sentence is one that usually described a range of appropriate sentencing responses,⁶⁴ a variation within the appropriate range is frequently granted. Rather than requiring the appellant to demonstrate that the original sentence is unfit, the assumption has been that even if the sentence at first instance is otherwise fit and within the range, a *de minimus* variation will also be fit.⁶⁵

52. A brief review of six cases demonstrates the approach by various Courts of Appeal:

⁶³ *R. v. Multani*, 2010 ONCA 305; *R. v. Daskalov*, 2011 BCCA 169, 270 C.C.C. (3d) 323; *R. v. McKenzie* 2011 ONCA 42 at para. 14-15 (an equivalent six years sought to be redistributed so that no single count attracted a sentence of more than two years less a day)

⁶⁴ *R. v. Hamilton*, (2004), 186 C.C.C. (3d) 129 at p.85

⁶⁵ *R. v. Arganda* (2011) MBCA 24, 269 C.C.C. (3d) 88; *R. v. Bahadur*, 2010 SKCA 103; *R. v. Almajidi*, 208 SKCA 56; *R. v. Morgan*, 2008 NWTCA 12, 239 C.C.C. (3d) 187 at para. 8-9.

*R. v. Kanthasamy*⁶⁶, Mr. Justice Donald for the British Columbia Court of Appeal, relied on Doherty J.A.'s comments in *R. v. Hamilton* (above) to concluded that the reduction the sentence by one day "***does no violence to the sentence imposed by the trial judge and avoids an unintended consequence of great significance.***" Donald J.A. further held that it is within the court's review power to adjust the sentence ***to prevent the disproportionate ramifications of a single day of imprisonment.*** Fitness of sentence relates not just to the quantum of the sentence but also to a *serious* but *unintended* collateral consequence of the penalty and impacts its proportionality. [Emphasis added]

*R. v. Q.A.M.*⁶⁷: Although the sentencing judge was told that proceedings for appellant's deportation were being considered, the court was not advised that a sentence of imprisonment of two years or more would preclude him from appealing his deportation order to the Immigration Appeal Division. The British Columbia Court of Appeal allowed a variation of the two-year sentence by one day to permit the appellant to preserve the right of appeal of a removal order. The court held that if a sentence of 24 months, which was suggested by the Crown at sentencing as the low end of the range, was fit then a sentence of two years less a day would be a reduction would be *de minimus*.

*R. v. Leila*⁶⁸: A joint submission of two years was reduced by the British Columbia Court of Appeal on the basis that the loss of the appellant's immigration appeal rights was a disproportionately severe collateral sanction, which was unforeseen by the appellant and his counsel at sentencing and unintended by the sentencing judge. Reducing the sentence by the amount requested was *inconsequential* to the sentencing principles relied on by the sentencing judge.

*R. v. Lacroix*⁶⁹: The Ontario Court of Appeal reduced by one day a sentence of two years imposed on a joint submission. The appellant was unaware of the immigration consequences of the two-year sentence and did not make them known to the sentencing judge. The court observed that those consequences were relevant and that "***no disservice to the fitness of the sentence would be caused by the variation.***" [Emphasis added.]

*R. v. Curry*⁷⁰: The Ontario Court found that while the sentence of two years was appropriate, a reduction to allow the appellant to preserve his right of appeal "***does no violence to the sentence imposed*** and avoids an unintended consequence of great significance."

⁶⁶ (2005) 195 C.C.C. (3d) 182, 2005 BCCA 135

⁶⁷ 2005 BCCA 615 at para. 29.

⁶⁸ 2008 BCCA 8 at para. 23.

⁶⁹ [2003] O.J. No. 2032 (C.A.)

⁷⁰ [2005] O.J. No. 3763 (Ont. C.A.)

*R. v. Tigse-Vaca*⁷¹: The Ontario Court of Appeal varied a two-year sentence imposed pursuant to a joint submission by one day, stating that the variation of one day “does not detract from the fitness of the sentence” imposed by the sentencing judge.

53. Reductions of the sentence by one day in order to relieve the appellants of the “collateral” consequences under *IRPA* were made, even where the original sentence was not deemed unfit, in *R. v. Duhra*⁷², *R. v. Iamkhong*⁷³, *R. v. Moretto*⁷⁴, *R. v. Nasabi*⁷⁵, *R. v. Almadji*⁷⁶, *R. v. Arganda*⁷⁷, *R. v. Doradea*⁷⁸ and *R. v. Chohan*⁷⁹, *R. v. Fam*⁸⁰ and *R. v. Jamieson*⁸¹, *R. v. Leung*⁸², *R. v. Nasabi*⁸³ and *R. v. Polio*⁸⁴.

d. Reductions of Sentence Beyond the *De Minimus*

54. In some cases, reductions of a sentence beyond the *de minimus* were granted where the original sentence was not unfit in order to preserve the offender’s appeal rights under *IRPA*:

*R. v. B.R.C.*⁸⁵: The Ontario Court of Appeal held that while the 30 months sentence for sexual assault was not unfit, interests of justice would be served if the sentence were reduced to two years less a day.

*R. v. Morgenwood*⁸⁶: The Ontario Court of Appeal reduced a three year sentence for sexual assault to two years less a day. The offender, a 24 year old man who had been had been in Canada since age 14, would be deported to South Africa. The Court considered that his entire family and social network was Canada. Although it could not be said that the original sentence imposed was harsh or excessive, or that the sentencing judge gave insufficient weight to the fact that the Appellant would likely be deported to a country where he had not been since he was a child, to which he had no

⁷¹ [2006] O.J. No. 1329 (Ont. C.A.)

⁷² 2011 ABCA 165

⁷³ 2009 ONCA 478 at para. 56-63.

⁷⁴ 2009 BCCA 139

⁷⁵ [2010] B.C.J. No 1141 (C.A.)

⁷⁶ 2008 SKCA 56 at para. 27 to 30

⁷⁷ 2011 MBCA 54 at para. 25 to 50.

⁷⁸ 2010 BCCA 423

⁷⁹ 2012 BCCA 188

⁸⁰ 2008 ONCA 696

⁸¹ 2011 NSCA 122

⁸² 2004 ABCA 55

⁸³ [2010] B.C.J. No. 1141 (C.A.)

⁸⁴ 2010 ONCA 769

⁸⁵ 2010 ONCA 561

⁸⁶ 2011 ONCA 366

connection, no family and no support, the Ontario Court of Appeal reduced the sentence from three years to two years less a day.

*R. v. Barkza*⁸⁷: The court varied a sentence of 26 ½ months for aggravated assault to two years less a day even though the judge had been advised of the immigration consequences, but not the specific loss of the right to appeal the deportation order.

*R. v. Lakatos*⁸⁸, the Ontario Court of Appeal, despite the absence of an error in principle, substituted a sentence of time served for a sentence of two years less a day imprisonment to be served as a conditional sentence and three years probation. On appeal, it became apparent that the Appellant would not be serving his sentence in the community but would be detained by immigration authorities for the conditional sentence portion of his sentence and then deported. The Court of Appeal concluded that had the trial Judge been aware of the real impact of his decision, he would have fashioned a different sentence and minimized the period of incarceration. The sentence was varied to give effect to the sentencing judge's intention. Time in custody was shortened to time served so that the appellant could be immediately deported.

e. Where Courts Have Refused to Vary the Sentence Despite Consequences to Immigration:

55. Courts have on occasion refused to vary a sentence outside the *de minimus* range or otherwise impose a sentence that would fall under the threshold for immigration consequences where such a sentence would be manifestly unfit. In *R. v. McKenzie*⁸⁹, the Ontario Court of Appeal refused to adjust a total sentence of six years on a number of weapons offences, including possession of a fully automatic pistol, three over capacity magazines and a silencer, in a way that would ensure that the offender was not sentenced to more than two years less a day on any one offence. In refusing to give effect to the Appellant's position, the Court stated the following:

[15] As this court recognized in *R. v. Hamilton* (2004) 72 O.R. (3d) 1 (Ont. C.A.), at para. 156, while immigration consequences can be taken into account, the risk of deportation cannot justify the imposition of an unfit sentence or the use of the sentencing process to circumvent the provisions and policies of the *Immigration and Refugee Protection Act*.⁹⁰

⁸⁷ (2011) ABCA 273

⁸⁸ 2011 ONCA 318

⁸⁹ 2011 ONCA 42

⁹⁰ 2011 ONCA 42 at para. 14-15.

Similarly, in *R. v. D.S.*⁹¹, the British Columbia Court of Appeal noted that:

No authority that goes so far as to “endorse a variation of an otherwise fit sentence to what may only be ... described as a demonstrably unfit sentence simply to allow an offender to retain his or her right of appeal from a possible deportation order. There is no authority for the proposition that an appellate court should intervene and change what is otherwise an appropriate sentence in order to avoid the consequences of a statutory provision of which the sentencing judge is fully aware.”⁹²

In *R. v. Badhwar*⁹³, Moldaver J.A. (as he then was) for the Ontario Court of Appeal, refused to intervene in the sentence, stating that courts ought not to impose *inadequate or artificial sentences* at all, let alone for the purpose of circumventing Parliament’s will on matters of immigration.⁹⁴ Similarly, in *R. v. Multani*, the Ontario Court of Appeal noted that “while the deportation consequences of the sentence may be a proper factor to consider in determining the appropriate sentence in certain cases, immigration consequences cannot take a sentence out of the appropriate range.”⁹⁵

56. Some appellate courts have refused to grant *de minimus* variations of sentence of one day, applying a deferential standard on review that requires the Appellant to demonstrate that the sentence imposed at first instance was unfit. In the appeals of *R. v. Guzman*, *R. v. Belance* and *R. v. Laplante*⁹⁶, the Quebec Court of Appeal considered whether consequences under

⁹¹ 2011 BCCA 143

⁹² *R. v. D.S.* 2011 BCCA 143 at para. 15-17; *R. v. Dhaliwal*, 2010 B.C.C.A. 50 at para. 10; *R. v. Martinez-Martel*, 2008 BCCA 136

⁹³ 2011 ONCA 266

⁹⁴ In *R. v. Badhwar* 2011 ONCA 266 at para. 41-46. The Appellant was convicted for his part in street racing on a busy highway that resulted in the death of an innocent person. He was sentenced to 30 months (less 5 months for pre-trial custody) for criminal negligence causing death and 12 months consecutive for failure to stop at scene of accident. On appeal, he sought to adjust his sentence to 23 months and 19 months consecutive in order to preserve his immigration appeal rights. He did not seek to change the total sentence of 37 months.

⁹⁵ *R. v. Multani* (2010), 261 O.A.C. 107 (Ont. C.A.); See also *R. v. Belenky* 2010 ABCA 98, 253 CCC (3d) 114 at para. 29. The court increased a sentence from two years less a day to two and a half years. In that case, the sentencing judge was fully apprised of the immigration consequences, but the Court of Appeal found that the sentence of two years less a day was not fit, holding that the consequence of immigration can only be given limited weight and cannot remove a sentence from an otherwise appropriate range. See also *R. v. Ariri*, 2010 ONCA 363 where the Court refused to reduce a sentence of two and a half years imprisonment to two years less a day to reflect immigration consequences. See also *R. v. Dhaliwal*, 2010 BCCA 50 where the court refused to reduce an effectively eight-year sentence to two years less a day; *R. v. Ranauta*, 2012 ABCA 326 where the court refused to redistribute the sentence among a number of offences in order to bring each one under the threshold of two years.

⁹⁶ 2011 QCCA 136, 84 C.R. (6th) 102.

s.64 *IRPA* should be taken into account to reduce sentences by one day. While the court acknowledged that the collateral consequences were relevant in sentencing, they are not determinative and it is not every time someone is sentenced to two years, that the sentence should be varied to two years less a day on appeal. To draw the distinction, the Quebec Court of Appeal held that on appeal it must be demonstrated that the sentence imposed at trial was *demonstrably unfit* in light of the fresh evidence. In conclusion, the Doyon J.A. stated that:

[102] In summary, the status of the appellants and the impact of the prison sentences on their right to appeal to the Immigration Appeal Division are relevant circumstances and must be taken into consideration. However, given the circumstances in which the offences were committed, their seriousness, the profile of the appellant, and the objectives and principles of sentencing set out in the Criminal Code, *I am of the view that the sentences inflicted on the appellants are fit even if they are not reduced by one day*, as the appellants seek.

[103] *Although the one day (or, in the case of Mr. Belance, the fifteen days) may appeal symbolic and some may therefore believe there is no harm in reducing the sentence by this much, in my opinion, such a view would be a misinterpretation of the law*. Indeed, the near total lack of factors suggesting a real possibility of rehabilitation and change of behaviour on the part of the appellants convinces me that, even if the judges had been aware of all the relevant facts, they would not have imposed sentences of less than two years' imprisonment solely to allow the appellants to preserve their right of appeal.⁹⁷ [Emphasis added.]

iv) *Does the Deferential Standard of Review Apply to De Minimus Variations of Sentence*

57. Sentencing decisions attract considerable deference.⁹⁸ Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. In *R. v. L.M.*,⁹⁹ this Court reiterated that appellate courts must show deference in appeals against sentence and should intervene only if the sentence is **demonstrably unfit**. However, in some circumstances, this Court has recognized that a *de minimus* variation such as a reduction of a sentence by one day, even where the original

⁹⁷ 2011 QCCA 136 at para. 102-103

⁹⁸ *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at 88-92; *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. Bunn*, 2000 SCC 9

⁹⁹ [2008] S.C.J. No. 31

sentence is not “unfit”, will not require deference. Rather, appellate intervention within the *de minimus* range is justified if it is giving effect to the sentencing judge’s likely intention.

58. In *R. v. Bunn*¹⁰⁰ Lamer C.J. held that where there has been an intervening change in the law between sentencing and appeal, it is “as though the sentencing judge has committed an error in principle, albeit for reasons beyond his or her control, because relevant principles have not been considered”. The Court of Appeal need not, therefore, defer to all of the trial judge’s findings, and can proceed to re-sentence the offender in light of the new principles. In cases where there has been an intervening change in an offender’s circumstances, namely a change in his immigration status by virtue of the sentence imposed, a similar principled exception can be made. It is the Appellant’s position that *de minimus* variations of sentence, either to give effect to the intention of the parties and the sentencing judge, or to maintain the proportionality of punishment in light of a change in the offender’s circumstance, do not violate the standard of appellate review set out by this Court. In other circumstances, where a variation outside a *de minimus* range is sought, the usual standard of deference ought to apply.

v) ***Standard for Admissibility of Fresh Evidence on Appeal Regarding Immigration Consequences***

59. Where the consequences of a sentence were unknown or unappreciated at sentencing, they are often brought forth by an offender on appeal. Usually, though not always, this is done through an application to adduce fresh evidence. The standard applicable to the admission of fresh evidence set out in *Palmer*¹⁰¹ was adapted to sentencing appeals by this Court in *R. v. Lévesque*¹⁰². The criteria as they apply to sentencing are as follows:

- 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
- 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue regarding the sentence.
- 3) The evidence must be credible in the sense that it is reasonably capable of belief.

¹⁰⁰ 2000 SCC 9 at 14-15, 21.

¹⁰¹ *Palmer v. The Queen*, [1980] 1 S.C.R. 759

¹⁰² [2000] 2 S.C.R. 487, 2000 SCC 47

- 4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.¹⁰³

60. With respect to the first criterion, this Court has stated that the failure to meet the due diligence criterion should not be used to refuse to admit fresh evidence on appeal if the evidence is compelling and if it is in the interests of justice to admit it.¹⁰⁴ While the routine admission of fresh evidence at sentencing could impact the integrity of the criminal process by creating a two-tier sentencing system, which would be incompatible with the high standard applicable to judicial review, the admission of evidence as to the specific circumstances of an offender including impact of a sentence is generally in the interests of justice.

61. In *Guzman*¹⁰⁵, the Quebec Court of Appeal suggested that if the consequences of the sentence on the rights for a particular offender were not brought to the attention of the sentencing judge through lack of diligence of counsel, the Court would not lightly permit evidence of these consequences to be adduced on appeal. With respect, to apply this standard, would be unfair to the offender. If through the lack of diligence of counsel an offender does not get the benefit of relevant circumstances being brought to the attention of a sentencing judge, it would be doubly unfair to prevent that offender from adducing evidence on appeal as to the impact of the sentence on his immigration status.¹⁰⁶ The approach suggested by the Quebec Court of Appeal would unduly punish an offender for the lack of diligence of his lawyer.

¹⁰³ *R. v. Lévesque*, [2000] 2 S.C.R. 487, 2000 SCC 47 at para.35; *R. v. Angelillo* 2006 SCC 55 at para. 13-20.

¹⁰⁴ *R. v. Lévesque*, [2000] 2 S.C.R. 487, 2000 SCC 47 at para.15

¹⁰⁵ *R. v. Guzman*; *R. v. Belance*; *R. v. Laplante*, 2011 Q.C.A. 136. See also In *R. v. Barkza*, 2011 ABCA 273 wherein the Crown took the position that counsel at trial was aware of, but chose not to make representations, regarding the immigration consequences to the sentencing judge. The Crown's position that a fresh evidence application with an explanation from counsel was necessary was not address by the Alberta Court of Appeal.

¹⁰⁶ In the United States, in some states the failure of counsel to advise an offender of the impact of a conviction on his or her immigration status can result in the conviction to be vacated. A. Menes, "Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment" (Fall, 2012) 14 *The Scholar* (St. Mary's Law Review on Minority Issues) 767

F. Conclusion:

62. The cases, and our sense of justice, support a variation of an otherwise legally fit sentence where the sentencing judge was unaware of the immigration consequences and those consequences render the sentence disproportionate to the offence and the moral blameworthiness of the offender. Whether the exercise of mercy or through the application of various sentencing principles, a *de minimus* variation is justified even where the original sentence is not *per se* unfit. Where it cannot be said that the sentences imposed resulted in any "unintended collateral consequence" (i.e. the sentencing judge was aware of the consequence), or to avoid the immigration consequence the sentence imposed would have to be manifestly unfit, courts have refused to reduce or otherwise alter a sentence to shield an offender from the consequences flowing from the immigration regime.

ISSUE TWO: Did the Court of Appeal of Alberta err in principle by refusing to vary the Appellant's sentence by one day?

A. Overview

63. It is the Appellant's position that the Alberta Court of Appeal's refusal to vary the Appellant's sentence by one day is wrong. The Court of Appeal erred in principle by failing to take into account the fundamental principle of sentencing: "proportionality". Rather, the Court of Appeal overemphasised the minor criminal record as a factor to distinguish those who deserve a *de minimus* variation from those who do not, and relied on a notion that citizens would be unfairly disadvantaged if non-citizens, facing deportation, are permitting a *de minimus* reduction of sentence. The Court of Appeal further erred by attributing "intention" to the intention of Parliament rather than the intention of the parties and the judge at sentencing. Lastly, (but perhaps most significantly) the Court of Appeal in effect usurped the function of the immigration authorities by concluding that the Appellant was the 'sort of person' who deserved to be deported therefore did not deserve to preserve his immigration appeal rights. The reduction of the Appellant's sentence by one day, even though the original sentence imposed was not necessarily unfit, would "do no violence to the sentence imposed by the trial judge and avoids an unintended consequence of great significance".¹⁰⁷ Indeed, as the Crown conceded before the Court of Appeal, the variation is negligible and still reflects the joint submission and decision of the sentencing judge.

B. Failure to Apply Proportionality in Assessing Fitness of Sentence

64. It is clear from the record of the sentencing proceedings that no one averted to the impact of a two-year, as opposed to a two-year-less-a-day, sentence on the Appellant's immigration status. The Appellant was sentenced to two years incarceration on the basis of a joint submission. The co-accused who was equally culpable and similarly situated but for the absence of any prior criminal record, received a sentence of two year less a day to be served in the community. Had the parties at sentencing and the trial judge understood the

¹⁰⁷ *R. v. Kanthasamy*, 2005 BCCA 135 at para. 23

Appellant's situation at sentencing, it seems certain the sentencing judge would have imposed a sentence of two years less a day.¹⁰⁸ A sentence of two years less a day imprisonment is a fit sentence.

65. This decision of the Alberta Court of Appeal stands for the proposition that "collateral" consequences, even where "unintended" by the parties and the judge at sentencing, are not a proper consideration in crafting a sentence. The majority did not find that the sentencing process can not be used to circumvent the provisions and policies of the *IRPA*. Just the opposite: *they used the criminal sentence to pre-determine the immigration issues and ignored, or refused, to take into account its impact on an offender and the fitness of the sentence*. Mr. Justice McDonald stated the following:

[24] The appellant *abused the hospitality* that has been afforded to him by Canada, particularly in light of the fact that he learned nothing from his prior encounter with the criminal justice system. *It would not be appropriate to fly in the face of a proper and acceptable joint submission* regarding the sentence under the circumstances of this case in order to undermine the provisions of the *Immigration Refugee Protection Act*. [Emphasis added.]

This approach is fundamentally wrong in principle. Many of the cases in which *de minimus* variations were granted, including *Duhra*, on which McDonald J.A. relied, were appeals from joint submissions of two year sentences which were reduced on appeal by one day.¹⁰⁹ It is unfair to an offender, who has joined in a sentence recommendation based on a misapprehension or lack of complete information as to its consequences, to then be tied to that agreement despite the likelihood that, had the immigration consequence been appreciated at sentencing, the joint submission would have accounted for it and a different sentencing recommendation would have been advanced. For this Appellant, the unfairness is

¹⁰⁸ It is not unusual for an offender to request a two year sentence over a sentence of two years less a day sentence on the understanding that early release occurs faster in the federal system or due to the availability of programs at one level or the other. See *R. v. Haultain*, 2012 ABCA 318 at para. 27; *R. v. Iamkhong*, 2009 ONCA 478 at para. 57. Also, in this case, counsel on behalf of the Appellant at sentencing requested that the trial Judge recommend that the Appellant serve his sentence in Ontario, rather than Alberta, which can be facilitated in the federal correctional system. The Appellant travelled to Alberta from Ontario for each of his court appearances, trial and sentencing. See Transcript of Sentencing Proceedings, *Appellant's Record*, Tab 11, p.70. See also T.W. Ferris, *Sentencing: Practical Approaches* (Toronto: LexisNexis Butterworths, 2005) at p.639-643

¹⁰⁹ *R. v. Duhra*, 2011 ABCA 165; *R. v. C.(B.R.)*, 2010 ONCA 561; *R. v. Leila*, 2008 BCCA 8; *R. v. Tigse-Vaca*, [2006] O.J. No. 1329 (C.A.); *R. v. Lacroix* [2003] O.J. No. 2032 (C.A.) *R. v. Haultain*, 2012 ABCA 318; *R. v. Almadji*, 208 SKCA 56

compounded by the fact that the Crown on appeal conceded that a *de minimus* reduction of the sentence by one day ought to have been made. In the instant case, the majority of the Court of Appeal did not act out of deference. Rather, it substituted its own assessment for that of the trier of fact.

C. Is a *De Minimus* Variation of the Sentence Contrary to Legislative Intention?

66. In this case, the Alberta Court of Appeal introduced an additional element into consideration. Rather than interpret “unintended” as referring to the state of mind or intention of the parties at sentencing and the sentencing judge, the Court attributed the lack of intention to legislative intention, stating:

[21] With respect, the plain and unequivocal language of a statute passed by Parliament of Canada cannot amount to “an unintended consequence of great significance.”¹¹⁰

The Alberta Court of Appeal concludes that where the “collateral” consequences are, in the assessment of the court, “deserved”, they are not “unintended”. The Court, with respect, confuses whether the lack of intention is attributable to the sentencing judge and the parties at sentencing or to the legislation. The Court added the existence of a criminal record as a factor for consideration in determining whether to grant relief.

67. There is no mystery to the legislative intention underlying the *IRPA* provisions at issue in this case. The intention of Parliament is to remove, as efficiently as possible, those non-citizens who are convicted of criminal offences and sentenced to two years¹¹¹ of incarceration or more. A criminal sentencing court would undermine that legislative intention if it were to impose *a manifestly unfit sentence in order to avoid those consequences*. That is not what the Appellant (and the Crown) proposed at the appeal nor is it what the Appellant is proposing to this Court. Where the difference is *de minimus* and it avoids a consequence that would render the effect of the sentence disproportionate to the offence and the offender or give effect to the intention of the parties and the sentencing judge, the sentence is not contrary to legislative intention.

¹¹⁰ Decision of the Alberta Court of Appeal, *Application Record*, p.19 at para. 21.

¹¹¹ Again, if Bill C-43 becomes law, this figure would be six months incarceration rather than two years incarceration.

D. Did the Court of Appeal Usurp the Function of an Immigration Tribunal

68. Immigration administrative tribunals are not mandated to deal with criminal law issues.¹¹² The criminal sentencing court is not the forum for deciding immigration issues. Sentencing judges (and appellate courts) must not usurp the function of the immigration authorities by pre-determining whether someone “deserves” to stay in Canada or “deserves” to be removed. At the same time, the function of the sentencing judge is to craft a fit sentence for the individual before the court. In doing so, the criminal court is mandated by sections 718 to 718 of the *Criminal Code* to take into account circumstances of the offender and the offence. The sentencing judge is required to consider the impact of the conviction and sentence on the individual before the court. Potential removal from Canada and the seriousness of that consequence for the particular individual is part of that impact and the circumstances of the offender. Removal could result in separation from family, especially children. It could mean that a life in built in Canada over time is ruptured. It could mean exile to a place otherwise foreign to the individual or having to face grave difficulties there. These are personal circumstances of the offender and these are relevant in the sentencing process. The loss of a right to appeal a removal order is, if not punitive, akin to a loss of a privilege or license. It can mitigate a sentence in the same way.

69. The adjustment of a sentence to preserve the right to appeal an immigration deportation order does not exempt an offender from the removal order. A criminal judge who adjusts a sentence to preserve the immigration appeal rights is not putting him or her self in the position of making a final determination regarding the offender’s immigration prospects. A judge who imposes a sentence to ensure that those appeal rights are lost is, for all practical purposes, making a final determination as to an offender’s immigration status.

70. In this case, rather than consider the circumstances of the Appellant and whether the loss of the right to appeal his deportation made the sentence disproportionate, the Court of Appeal took a different approach. McDonald J.A. held that the usual approach did not apply

¹¹² *Li v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 992.

because the Appellant has convictions for “serious criminal offences”¹¹³ and because he had “abused the hospitality that has been afforded to him in Canada”. Put another way, the Court of Appeal determined that the Appellant did not “deserve” to stay in Canada. With respect, in reaching its conclusions on this basis, the Court of Appeal usurped the function of the immigration tribunal and made final determinations regarding the Appellant’s immigration issues (without ever considering the criteria set out in the IRPA and its regulations for the determination of such questions).

E. Does a *De Minimus* Variation of a Sentence to Preserve Immigration Appeal Rights Unfairly Disadvantage Canadian Citizens

71. In its decision in the current appeal, the Alberta Court of Appeal suggested that it is inappropriate to factor deportation or the loss of immigration appeal rights in sentencing because to do so would have the unfair result of penalizing Canadian citizens. McDonald J.A. maintained that “it would be a strange and unfortunate legal system wherein a non-citizen could expect to receive a lesser sentence than a citizen for the same crime. No such distinction should be countenanced.”¹¹⁴ In an earlier case, *R. v. Duhra*, although the sentence variation was allowed, the court stated:

[9] We recognize the illogic of reducing a sentence for an offender either to a disproportionately low sentence or to a lower sentence than a citizen might receive reasonably for the same crime in order to assist an offender guilty of serious criminality towards a lighter burden under section 64 IRPA. [...] *With all due respect to a few appeal panels in Canada which may have reached somewhat different results in a few cases, we are not persuaded that citizenship should be a disadvantage for sentencing purposes.* [Emphasis added.]¹¹⁵

72. With respect, a *de minimus* variation of sentence is inconsequential in terms of the length of sentence. Conversely, deportation is a significant additional consequence which

¹¹³ These offences do not trigger the “serious” criminality provisions of the IRPA due to the minor sentences received: one day in jail and three months conditional sentence.

¹¹⁴ Decision of the Alberta Court of Appeal, *Appellant’s Record*, Tab 4, p.19 at para. 23.

¹¹⁵ 2011 ABCA 165 at para.9.

would not be suffered by a citizen. Rosenberg J.A., in *Curry*¹¹⁶, accurately noted that an offender who is sentenced to two years but then permanently uprooted from this country and his family without any recourse to any appeal tribunal, suffers a significant consequence far beyond what most other similarly situated persons would face. The disproportionate effect¹¹⁷ of a sentence on some, as a result of characteristics irrelevant to the offence such as immigration status, would undermine the credibility and integrity of the criminal justice.¹¹⁸

F. The Relevance Of A Criminal Record To An Application For Relief From “Unintended” “Collateral” Consequences

73. The Court of Appeal sought to distinguish its approach in this case from previous decisions of the same court and other provincial courts in light of the Applicant’s prior criminal record.¹¹⁹ This is not a legitimate or principled distinction. While the Appellant in this case had a minor, dated record which would not have triggered the “serious criminality” provisions of the *IRPA*, many of the appellants in other cases from Alberta and other provinces where sentences were varied on appeal also came to court with prior criminal records:

*R. v. Kanthasamy*¹²⁰: The appellant had two prior convictions, one in 1998 for mischief over \$5,000 and failure to comply with a recognizance for which he received a total fine of \$250, and another in 2003 for mischief for which he was sentenced to time served, placed under a probation order for 12 months (unsupervised) and ordered to pay restitution of \$250 and a victim surcharge of \$50.

*R. v. Duhra*¹²¹: while it was not referred to in the decision, Mr. Duhra’s prior criminal record was included in the Appendix to the factum of the appellant which was before the Alberta Court of Appeal and again brought to the attention of the panel hearing the appeal in this case.

¹¹⁶ [2005] O.J. No. 3763 at para. 34-35. Mr. Curry had lived in Canada for 20 years, had 5 children and operated a legitimate business for many years. His sentence was reduced by 20 days to preserve his immigration appeal rights.

¹¹⁷ *R. v. Craig*, 2005 SCC 23 at para. 39 per Abella J.

¹¹⁸ Treating citizens and non-citizens differently under immigration law is not a violation of s.15 of the *Charter*. See *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 129-132.

¹¹⁹ Decision of the Alberta Court of Appeal, *Appellant’s Record*, Tab 4, p.17 para. 15; p.18, para. 24 to 26.

¹²⁰ [2005] B.C.J. 517, 2005 BCCA 135

¹²¹ 2011 ABCA 165

*R. v. Barkza*¹²²: the appellant, convicted of aggravated assault on his wife, had no prior criminal record on the offence date but accumulated seven breaches of bail conditions relating to the offence subject of the appeal. He was sentenced for these breaches on prior to the hearing of the appeal to an equivalent of six months of the time spent in pre-sentence custody.

*R. v. Curry*¹²³: the 38 year old appellant had a record consisting of one conviction for possession of marijuana in 1993, for which he received a \$300 fine.

*R. v. Leila*¹²⁴: the appellant had a significant criminal described by the court as “mainly for property offences, begins in 2001 and coincides with his becoming addicted to heroin. Since 2002, the sentences he has received have been for periods of incarceration of increasing length, although all within the provincial system”.

*R. v. Q.A.M.*¹²⁵: the appellant not only had a prior criminal record, **he had also been subject to a previous deportation order** on the basis of his prior criminal conduct.

In *R. v. Haultain*¹²⁶, a decision released after the decision in this case, the Alberta Court of Appeal varied the sentence of the appellant in that case by eleven days despite a previous minor criminal record with multiple convictions on the basis of unintended collateral consequences to immigration.

74. The criminal record of an offender is a relevant consideration in fashioning a fit sentence. Obviously, the sentence imposed on an offender with a criminal record may be significantly different from a sentence imposed on an offender without a prior record. However, the Court of Appeal did not use the Appellant’s prior convictions to assess the proportionality or fitness of the sentence. Rather, the Court of Appeal in this case focused on the prior criminal record of the Appellant as a way to distinguish him from others who had received the relief he was seeking. Rather than look at proportionality, fitness of sentence and the circumstances of the offender as a whole, the Court of Appeal picked on an artificial and factually inaccurate distinction. A decision based on such a false distinction is fundamentally wrong.

¹²² 2011 ABCA 273

¹²³ [2005] O.J. No. 3763, 77 O.R. (3d) 587 (C.A.);

¹²⁴ 2008 BCCA 8, 67 Imm. L.R. (3d) 82

¹²⁵ 2005 BCCA 615

¹²⁶ 2012 ABCA 318 at para. 29-30

G: Conclusion

75. The Appellant is a young man who has lived in Canada for more than 15 years (his whole adult life). His family and all of his supports are in Canada. The offence of which he was convicted was at the low end of moral blameworthiness. Applying the factors set out in *Morrisey* by this Court to the assessment of the gravity of the offence (the character of his actions and the consequences of those actions)¹²⁷ this offence was towards the low range. The evidence at trial reveals that at a time when he was nearly homeless in a strange city, he took up an offer to stay in a house of strangers. He and the co-accused stayed there for three weeks before being arrested. While they were found to be willfully blind to the marijuana grow operation that was housed in the basement or parties to the offence as “door keepers”, they did not participate in looking after the plants nor did they profit from the operation. A sentence of incarceration of two years less a day would have been, and remains, a fit sentence. Had immigration consequences been averted to at sentencing, the Appellant’s immigration appeal rights would have been preserved. On appeal the Crown conceded that two years less a day is a fit sentence and that the variation of one day was in keeping with the intention of the parties at sentencing and the sentencing judge. The Alberta Court of Appeal’s refusal to give effect to this position is wrong in principle and unfair.

¹²⁷ *R. v. Morrisey* [2000] SCC 39 at para. 35-36.

PART IV - COSTS


76. The Appellant does not seek its costs on this appeal. If the appeal is dismissed, the Appellant asks that no costs order be made against him.

PART V - ORDER REQUESTED

77. The Applicant requests an order granting the appeal, setting aside the sentence of two years incarceration and varying the sentence to one of incarceration for two years less a day.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 10th, 2012



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RELEVANT STATUTES

1. *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, s.12
2. *Criminal Code*, R.S., 1985, c. C-46, ss. 718 and 718.1
3. *Immigration and Protection of Refugee's Act*, R.S.C. 2001, c.27, ss.36, 44, 63, 64, 66, 67, 68

Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, s.12

s.12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Criminal Code, RSC, 1985, c C-46 (as amended)

Purpose

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Serious criminality

- 36.** (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;

(b) 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.

(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.

(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;

(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;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence 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 the *Youth Criminal Justice Act*.

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

Right to appeal — visa refusal of family class

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

No appeal for inadmissibility

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

(3) No appeal may be made under subsection 63(1) in respect of a decision that

was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

Humanitarian and compassionate considerations

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Disposition

66. After considering the appeal of a decision, the Immigration Appeal Division shall

- (a) allow the appeal in accordance with section 67;
- (b) stay the removal order in accordance with section 68; or
- (c) dismiss the appeal in accordance with section 69.

Appeal allowed

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

- (a) the decision appealed is wrong in law or fact or mixed law and fact;
- (b) a principle of natural justice has not been observed; or

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

Removal order stayed

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

(2) Where the Immigration Appeal Division stays the removal order

- (a) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;
- (b) all conditions imposed by the Immigration Division are cancelled;

(c) it may vary or cancel any non-prescribed condition imposed under paragraph (a);
and

(d) it may cancel the stay, on application or on its own initiative.

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

***Charte Canadienne des Droits et Libertés, Loi Constitutionnelle de 1982, ch. 11 (r.u.),
Annexe b***

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

.....
Code Criminel L.R.C. 1985, c C-46

Objectif

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

- a) dénoncer le comportement illégal;
- b) dissuader les délinquants, et quiconque, de commettre des infractions;
- c) isoler, au besoin, les délinquants du reste de la société;
- d) favoriser la réinsertion sociale des délinquants;
- e) assurer la réparation des torts causés aux victimes ou à la collectivité;
- f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

.....
Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

- a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
- b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une

infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Note marginale : □Criminalité□(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Note marginale : □Application□(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquiescement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ni sur une infraction dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985), ou de la *Loi sur le système de justice pénale pour les adolescents*.

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

Droit d'appel : visa

63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

(2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

(4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.

(5) Le ministre peut interjeter appel de la décision de la Section de l'immigration rendue dans le cadre de l'enquête.

Restriction du droit d'appel

64. (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

(3) N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.

Motifs d'ordre humanitaires

65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

Décision

66. Il est statué sur l'appel comme il suit :

- a) il y fait droit conformément à l'article 67;
- b) il est sursis à la mesure de renvoi conformément à l'article 68;
- c) il est rejeté conformément à l'article 69.

Fondement de l'appel

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

- a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
- b) il y a eu manquement à un principe de justice naturelle;
- c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

□(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

Sursis

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

□(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.

□(4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

