3.1

Deportation: Disproportionate Response

Permanent residents enjoy a broad range of rights. They can live anywhere and move throughout Canada. They can study and are entitled to access social services, including provincial health insurance. They are protected under the *Charter*. But unlike full citizens, they are unable to vote, run for political office, or hold certain high-level jobs requiring security clearance. They also do not have an unqualified right to remain or to return to Canada once they have left.

Permanent residents can retain their status as long as they comply with the requirements of the *Immigration and Refugee Protection Act 2001*.[1] If they do not, they become inadmissible to remain. They can be ordered to leave the country for failing to meet residency obligations, or for reasons relating to security, criminality, and misrepresentation. Despite the name, their residency is not necessarily permanent.

In this chapter, we focus on the grounds and processes used to detain and deport permanent residents. We start by putting the current statutory scheme into an historical context, with a look at how Canada's deportation laws have evolved over time. We then examine the changes that have been introduced under the *Immigration and Refugee Protection Act 2001* and their consequences. The rights of certain individuals to appeal their removal orders have been limited. These changes have attracted the most critical commentary because of the significant negative impact on the persons affected.

1 Statutes of Canada, 2001, c. 27.

Deportation and associated measures are all part of the enforcement provision of the act. The Canadian Border Services Agency is the leading government agency responsible for the enforcement. It works closely with Immigration, Refugees and Citizenship Canada in the process. Each year, thousands of foreign nationals and permanent residents receive removal orders. Some become immediately enforceable. Others may only become enforceable once the person has waived or exhausted all legal remedies to remain. Annual deportation figures are not easy to find, and once located, they do not provide a breakdown in terms of how many permanent residents were ordered removed, the reasons for the removal, or whether their departure was voluntary.

Cumulative statistics indicate that annual removals between 2006 and 2014 ranged from 10,000 to 14,000 persons.[2] Approximately 8,700 persons were removed each year from 2016 to 2019,[3] reportedly rising to over 10,000 annually through 2023.

Context

Canada has consistently retained broad grounds for removing non-citizens, including permanent residents.[4] For most of Canadian history, the government could order immigrants to be removed within several years of their arrival for wide-ranging reasons.[5] After they acquired domicile by living in Canada for a defined number of years, they could only be removed on very limited grounds, such as treason.

2 Never Home, "'Back to Where You Came From': Canada Deports 35 People Daily," Neverhome.ca, accessed 30 August 2022, http://www.neverhome.ca/deportation/.

3 Auditor General of Canada, "Report 1 – Immigration Removals," *Report of the Auditor General of Canada* (Ottawa: Office of the Auditor General of Canada, 2020), https://www.oag-bvg.gc.ca/internet/english/parl_oag_202007_01_e_43572.html.

4 For more on the history of deportation, see Kelley and Trebilcock, *Making of the Mosaic*; Dennis G. Molinaro, *Deportation from Canada*, Immigration and Ethnicity in Canada Series, Booklet No. 36 (Ottawa: Canadian Historical Association, 2018).

5 Domicile was three years under the *Immigration Act, 1910* and raised to five years in 1914.

The grounds for deportation proceedings reflected political, social, and cultural biases of the day. Early legislation provided for the removal of immigrants who had received social support, had been convicted of a crime, or had required hospital care. There was also a wide array of medical ailments that could initiate removal proceedings. Conduct that fell within the realm of "moral turpitude" could trigger removal as could being considered "feeble-minded" or an "idiot."[6]

Deportation grounds were expanded during periods of labour and social activism, notably leading up to First World War and spanning the 1920s and 1930s. Grounds for removal extended to persons advocating the overthrow of governments by force, attempting to create a riot or public disorder, and being affiliated with any organization advocating against organized government.

During wartime, immigrants from enemy countries could be deported. And as explained in the introduction, during the Second World War, this even included the deportation of Canadian citizens – those of Japanese descent.

Persons with deportation orders had few due-process protections. Boards of inquiry reviewed the orders, whose members were appointed by the minister. There was no right to an oral hearing nor opportunity to challenge the minister's evidence.[7] The boards of inquiry could consider any evidence they thought trustworthy. Most decisions could be appealed to the minister, but only on narrow grounds. They were rarely successful. Judicial review was confined to the examination of legal errors. This absence of fair process could lead to great hardship. It was at its worst for those whose lives were at risk upon removal, for spouses and children who were also removed, and for individuals who arrived in Canada at a young age, and so had no connection to their country of nationality.

These features – alongside the other tortuous and often unedifying aspects of Canadian deportation history – began to be

6 *Immigration Act, 1910*, S.C., c. 27, s. 3.
7 Molinaro, *Deportation from Canada*, 5.

addressed in the 1960s.[8] With the liberalization of immigration policy then and into the 1970s, the grounds for deportation became more clearly defined in legislation. This was accompanied by making removal order procedures fairer, providing those ordered to be removed more opportunity to know the case against them, and the ability to contest the removal order.

However, the protection that acquiring domicile used to provide from deportation was removed in the *Immigration Act, 1976*.[9] Consequently, a permanent resident could be removed from Canada if they contravened the provisions of it, irrespective of how long they had lived in country. The grounds for deportation focused on serious criminal behaviour, security risks, and misrepresentation.

In 1967, the Immigration Appeal Board was established. It was an independent tribunal with jurisdiction to hear appeals from persons issued with a deportation order, as well as from Canadians whose family sponsorships had been denied. It could overturn previous decisions if there were errors of fact or law, or if there were hardship factors and/or humanitarian and compassionate grounds to do so. This was an important development as it enabled the board to weigh the risk the individual posed to society against the harm the person or members of their family would suffer if removed.

An initial constraint on the Immigration Appeal Board's jurisdiction stopped it from considering humanitarian and compassionate grounds where a security certificate had been issued against the person. The government can issue a security certificate where the information supporting the removal order cannot be disclosed without endangering the safety of a person or risking national security. It has the effect of limiting a person's appeal rights. The limitation has since been expanded to apply to any permanent

8 In 1952, Special Inquiry Officers were established to investigate whether a person should be deported. Appeals were permitted to a three-person Immigration Appeal Board appointed by the minister. The minister retained the final decision. Molinaro, *Deportation from Canada*, 19.

9 Warren Black, "Novel Features of the Immigration Act, 1976," *Canadian Bar Review* 56, no. 4 (1978): 561–78, esp. 569 regarding criminal inadmissibility.

resident or refugee found inadmissible due to concerns related to national security, serious criminality, violations of human or international rights, or involvement in organized crime.[10]

The *Immigration Act, 1976* also set up three types of removal orders that remain in effect today: deportation, exclusion, and departure orders.

A deportation order prevents a person from returning to Canada without prior authorization. An exclusion order prevents return for a period of one year, unless otherwise authorized. A departure order means a person must leave Canada within a specified period, but they can return to the country provided they have complied with the order and otherwise qualify for admission.

In 1986, the Immigration Appeal Board ended, to be replaced by the Immigration and Refugee Board. It remains operational to this day. Within the board, the Immigration Appeal Division is responsible for addressing appeals connected to removal orders and rejected family sponsorship applications.[11] In 1993, an Adjudication Division was added to the board. It conducts admissibility hearings and detention reviews for foreign nationals and permanent residents suspected of being either inadmissible to Canada or removable from the country.[12]

In 1992, the Supreme Court of Canada issued a ruling that was to have profound influence on the ability of permanent residents to challenge the constitutionality of a removal order. The ruling in the case of *Chiarelli*[13] related to a man convicted of two criminal offences, receiving a suspended sentence for one, and six-month sentence for the other. He had been living in Canada for ten years, arriving at the age of fifteen. Because the maximum term of

10 Discussed more fully later in this chapter. Previously, a security certificate was issued upon the recommendation of the Minister of Manpower and Immigration and the Solicitor General. Under the *Immigration and Refugee Protection Act, 2001*, it is the Minister of Immigration and Citizenship and the Minister of Public Safety.

11 Refugee Determination Division and the Immigration Appeal Division.

12 Its members are from the Canadian civil service. Vinokur, "30 Years of Changes at the Immigration and Refugee Board of Canada," 8.

13 *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (SCC), [1992] 1 SCR 711.

imprisonment for both offences was over five years, Chiarelli fell within the provision for serious criminality under the *Immigration Act, 1976* and a deportation order was issued.

The Solicitor General and the Minister of Immigration subsequently issued a security certificate against him on the grounds that he was likely to participate in organized crime. Chiarelli's right of appeal was therefore limited to questions of fact or law and did not include humanitarian and compassionate considerations. Chiarelli argued that this violated his right under the *Charter* not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice.

The Supreme Court ruled against Chiarelli, and in its decision, it made several findings. First, it said it need not consider whether deportation amounts to a deprivation of life, liberty, or security of the person because there was no breach of fundamental justice. According to the Court, the content of fundamental justice depends on context, and specifically in this case, on the principles and policies underlying immigration law.

The Court elaborated by stating that an underlying principle of the *Immigration Act, 1976* was that non-citizens do not have an unqualified right to enter or remain in the country. Parliament, it said, has the right to establish the conditions upon which a person can be removed, and deportation is the only way to give those conditions practical effect.[14]

Considering this finding, the Court determined that the appeal rights in the act provided ample protection from an erroneous decision. The principles of fundamental justice did not require a consideration of Chiarelli's personal circumstances, any mitigating factors, or the harm he might face if removed.[15]

It was a noteworthy decision because the Court was willing to consider what fundamental justice required without considering if Chiarelli's life or liberty were at stake. It also narrowly defined the underlying principle of the *Immigration Act, 1976* – as enforcement – and used this to determine the content of the *Charter* right. It did not use the *Charter* as the benchmark to determine the

14 *Canada (Minister of Employment and Immigration) v. Chiarelli*, 733.
15 *Canada (Minister of Employment and Immigration) v. Chiarelli*, 734.

constitutionality of the act. In effect, this denied supremacy to the *Charter.* There was also no requirement that the government justify its actions as proportionate under section 1 of the *Charter*.

Ten years after *Chiarelli*, the Supreme Court of Canada considered the constitutionality of legislative provisions again – this time over the deportation of a suspected terrorist from Canada. The case of *Suresh* involved a refugee who had fled to Canada from Sri Lanka in 1990 and was recognized as a refugee the following year.[16] He had been detained and ordered removed following the issuing of a security certificate. The proceedings were based on allegations that he was a member of the Liberation Tigers of Eelam (LTTE), an alleged terrorist organization. Suresh was not provided the information that formed the basis of the removal order nor was he provided an opportunity to respond to it.

Suresh argued that if he returned to Sri Lanka he would face torture. Given this threat to his life and security of person he required a higher level of procedural fairness than was provided to him. The Court acknowledged that international law generally rejects deportation to torture, even where national security interests are at stake. However, it left open the possibility that deportation to torture could be constitutional in exceptional cases.

Where deportation to torture was under consideration, the Court held that the person must be informed of the case to be met, subject to privilege and other valid reasons for limited disclosure. The person must also be provided with an opportunity to respond in writing to the case, and to challenge the minister's information.

The Court placed the onus on the person named in the security certificate to establish a *prima facie* case of the risk of torture, noting that the minister had the discretion to determine whether that threshold was met. The Court made it clear that the minister's decision was entitled to deference and that courts should not interfere with the decision if the evidence reasonably supported a finding of danger to the security of Canada.[17]

16 *Suresh v. Canada (Minister of Citizenship and Immigration) [2002]* 1 S.C.R. 3.

17 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 28–9, 64.

Both the *Chiarelli* and *Suresh* decisions limited the applicability of the *Charter* in deportation decisions and, as we shall see, that includes those decisions made under the authority of the *Immigration and Refugee Protection Act 2001.*

Relevant Legislative Provisions

The *Immigration and Refugee Protection Act, 2001* retained the basic deportation framework of previous legislation while expanding the grounds for which a permanent resident could be removed and limiting procedural protections for some.

Grounds

Permanent residents can be removed from Canada if they become inadmissible as defined by the act. There are several grounds of inadmissibility, as outlined in the beginning of part 2. The most used grounds relate to serious criminality, security, non-compliance with the act, and misrepresentation.

Removal order decisions can be appealed to the Immigration Appeal Division, apart from those based on violations relating to serious criminality, organized crime, security, and human or international rights. Judicial review by the Federal Court of Canada is only permissible if one of its judges certifies that a serious question of general importance is involved.[18]

Serious Criminality and Organized Criminality

A permanent resident can be ordered removed from Canada for having been convicted of a serious criminal offence punishable by at least ten years imprisonment or where a term of imprisonment of more than six months has been imposed.[19]

18 *Immigration and Refugee Protection Act*, S.C. 2001, s. 74(d).
19 *Immigration and Refugee Protection Act*, S.C. 2001, s. 36(1)(a) (b).