

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).

Amendments in 2013 also widened grounds for removal to cover crimes and potential offences committed beyond Canada's borders. Permanent residents can be ordered removed if they have been convicted of an offence that in Canada would qualify for a sentence of ten years or more, or if there are reasonable grounds to believe they have committed such an offence.²⁰ An actual conviction therefore is not necessary.

Being a member of an organization believed to be engaged in serious criminal activity can also be a basis for removal proceedings.²¹

Initially, serious criminality was defined as a conviction with a possible sentence of ten years or more, or one where the person was sentenced to more than two years in prison. In 2013, the Conservative government lowered the bar, to sentences of six months or more.²² In 2017, the Supreme Court of Canada clarified that these provisions did not apply to individuals with a conditional sentence of more than six months.²³

The change brought a vast array of crimes – from egregious offences to the relatively minor – within the definition of serious criminality, potentially triggering removal orders that could not be reviewed by the Immigration Appeal Division. It meant serious criminality now encompassed acts of violence, offences linked to drugs, convictions for driving under the influence, and a spectrum of theft and fraud transgressions exceeding \$5,000 dollars.²⁴

While most commentators acknowledge that serious criminality may be a justified ground for deportation, the low threshold of qualifying offences has attracted extensive criticism. So too has the removal of appeal rights. Many argue that deportation should be for the most serious offences and with due regard to other

20 *Immigration and Refugee Protection Act*, S.C. 2001, s. 36(1)(c).

21 *Immigration and Refugee Protection Act*, S.C. 2001, s. 37.

22 *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16.

23 *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50. Because the Supreme Court decided that sentence of imprisonment covered "prison" sentences, it did not apply to persons with a conditional sentence.

24 Foreign Worker Canada, "Crimes That Make You Inadmissible to Canada," accessed 18 July 2024, <https://www.duicanadaentry.com/crimes-that-make-you-inadmissible-to-canada/>.

mitigating and relevant factors, which the removal of the Immigration Appeal Division's jurisdiction denies.²⁵

Some legal advocates argue that deporting permanent residents convicted of a criminal offence amounts to a form of double jeopardy. Having already been convicted and served their sentence, they face further punishment through deportation.²⁶ Eliminating their right to appeal to the Immigration Appeal Board over the deportation process exacerbates the harm.

Security

Scholars and advocates were very critical of the increased use of security certificates following the 11 September 2001 terrorist attacks in the United States. They were seen as a way of limiting fair process and expediting removals. The certificate process proved unwieldy and exceedingly complex. It is now rarely used, although it has not been repealed. Instead, the legislation was changed to broaden the grounds of removal, limit rights of appeal, and provide for expedited removals on security grounds. As with security certificates, disclosure of evidence leading to the removal order can be limited. And there is no right of appeal to the Immigration Appeal Division.²⁷

Acts that fall within the security grounds include engaging in an act of espionage against Canada or Canadian interests; subversion by force of any government; and subversion of any kind against a democratic government, institution, or process. Security grounds also include engaging in terrorism; being a danger to the security of Canada or to the lives and safety of persons in Canada. Being a member of an organization that there are reasonable grounds

25 Canadian Bar Association, "Bill C-43, Faster Removal of Foreign Criminals Act," accessed 18 July 2024, <https://carl-acaadr.ca/bill-c-43-the-faster-removals-of-foreign-criminals-act/>.

26 Souheil Benslimane and David Moffette, "The Double Punishment of Criminal Inadmissibility for Immigrants," *Journal of Prisoners on Prisons* 28, no. 1 (2019): 44–65, <https://doi.org/10.18192/jpp.v28i1.4351>.

27 *Immigration and Refugee Protection Act*, S.C. 2001, ss. 64(1), 86.

to believe engages in espionage, subversion, or terrorism is also grounds for removal.²⁸

The membership provisions have been criticized as overly harsh because they can include individuals who may not be aware of the criminal activities of the group. They may have become members because of cultural, social, or humanitarian activities.

Commentators have pointed out that the wording in the *Immigration and Refugee Protection Act 2001* regarding terrorism is far vaguer than in the *Criminal Code*. The *Criminal Code* defines terrorism, requires criminal misconduct, and excludes activities that are not intended to harm such as advocacy, protest, and other forms of dissent. The act's legislation does not.²⁹ The provisions of the act cast a wider net and can be used against individuals who join associations that are subsequently declared to be terrorist organizations, or who are not associated with violent activity, or were even unaware of it.

Human or International Rights Violations

Inadmissibility also applies to persons who have held office or participated in governments that have been involved in systematic or severe human rights violations, genocide, war crimes, or crimes against humanity.³⁰

Non-Compliance with the Act and Misrepresentation

Permanent residents are required to live in Canada for two out of five years. Those who fail to meet this requirement can be found inadmissible and removed. Additionally, those who provided false or misleading information during the immigration process can have their status revoked and be ordered removed.³¹

28 *Immigration and Refugee Protection Act*, S.C. 2001, s. 34(1).

29 Barbara Jackman, "Charter Rights to Privacy and Security: The Impact of International Terrorism and Globalization: Impact on Charter Rights in Immigration Law," *National Journal of Constitutional Law* 19 (2005/2006): 236-7; *Criminal Code*, S.C., 1985, c. C-46, ss. 83.01(1)(b)(ii)(A).

30 *Immigration and Refugee Protection Act*, S.C. 2001, s. 35(1).

31 *Immigration and Refugee Protection Act*, S.C. 2001, ss. 28, 40, 41.

Process

If a permanent resident – or recognized refugee – is suspected of being inadmissible, an initial investigation is conducted by Immigration Refugees and Citizenship Canada and the Canadian Border Services Agency. Where these agencies believe there is enough evidence of a breach of law, the person will be instructed to appear at an admissibility hearing before the Immigration Division.

Detention Decisions

While awaiting an admissibility hearing the person can be detained if the government is of the view that the person may not appear at the hearing or is a danger to the public. Special provisions apply to minors, who can only be detained as a “measure of last resort.”³² Directives issued under the authority of the act elaborate that alternatives must always be considered, and if a minor is detained, it must be for the shortest duration possible and under appropriate conditions.³³

Removal Order Hearings

Hearings before the Immigration Division are adversarial. The applicant can have legal representation, and the minister is represented by counsel for the Canada Border Services Agency. If found to be inadmissible, the person is ordered to be removed from Canada. If the person is not in Canada, the person will not be allowed to enter the country unless the decision is successfully overturned.

32 *Immigration and Refugee Protection Act*, S.C. 2001, s. 60.

33 For example, a detained parent or guardian may request that their child remain with them while in detention. This request can only be granted if the detaining officer determines that it is the best interests of the child and should be for the shortest time possible. *Immigration and Refugee Protection Act Regulations*, s. 248.1; Canadian Border Services Agency, “Arrests, Detentions and Removals – National Directive for the Detention or Housing of Minors,” last updated 23 May 2024, <https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html>.

Decisions made by the Immigration Division can be appealed to the Immigration Appeal Division unless the person has been found to be inadmissible for reasons of serious criminality, organized crime, security, or violating human and international rights. The minister and the person concerned can seek leave of the Federal Court to review a decision by either division, but the person can be removed from Canada before their application is determined.

Prior to removal, the person can make an application for a Pre-Removal Risk Assessment to Immigration Refugees and Citizenship Canada. This assessment is for those who believe they would be at risk of persecution, torture, or cruel or unusual punishment if they return to the country of nationality.³⁴

The application is determined by an immigration officer. Consideration entails whether there is more than “a mere possibility” that the person will face persecution, or it is “more likely than not” they would be at risk of their life, torture, or cruel and unusual treatment. If a person’s Pre-Removal Risk Assessment application is approved, they receive protected status unless their removal order is based on serious criminality, organized criminality, human rights violations, or security concerns. In those cases, the removal order is stayed, but it is also subject to being reviewed again. Favourable Pre-Removal Risk Assessments are relatively rare.

If the person’s Pre-Removal Risk Assessment is denied, the person can seek leave for judicial review from the Federal Court. But there is no right to remain in Canada until the court makes a decision.

The most controversial aspects of the removal process concern the detention provisions and restrictions on the rights of review of certain deportation decisions discussed below.

34 If deemed inadmissible on security or serious organized criminality grounds, the person cannot use the persecution basis for a Pre-Removal Risk Assessment. They can ask for a PRRA “only to screen for a substantial risk of death, torture, or cruel and unusual treatment or punishment.” Graham Hudson, “Ordinary Injustices: Persecution, Punishment, and the Criminalization of Asylum in Canada,” in *Immigration Policy in the Age of Punishment: Detention, Deportation, and Border Control*, ed. David C. Brotherton and Philip Kretsedemas (New York: Columbia University Press, 2018), 80.

Removal

Removal orders become enforceable once all legal recourses have been waived or exhausted. In 2020, the Auditor General released a report focusing on immigration removals, specifically assessing the Canadian Border Services Agency's handling of individuals under enforceable removal orders.

The findings revealed that the Agency's approach had not resulted in timely removals, leading to a backlog exceeding 50,000 cases. In "two thirds of these cases, the Agency did not know the whereabouts of the individual."³⁵ While certain situations hindered removals, such as specific medical needs of the person, perilous conditions in the country of origin, or lack of cooperation from those countries in accepting their nationals back, the primary causes for delayed removals were attributed to the management practices within the Canadian Border Services Agency. These issues included poor data quality, and deficiencies in information sharing with Immigration, Refugees, and Citizenship Canada.

Removal rates reportedly increased in 2023, although over half of those issued a deportation order between 2016 and mid-2023 remained in Canada. The immigration department explained that this was inevitable as individuals who are issued removal orders have the right to have the decision reviewed, and it can take time to exhaust all remedies. It is also the case that the government does not have formal exit controls, so it does not have accurate figures of how many people may have voluntarily left the country.³⁶

Meanwhile, some advocates complain that too many people are being unfairly deported and they question why the government has not fulfilled a 2021 promise to regularize the status of

35 Auditor General of Canada, "Report 1," 3.

36 Marie Woolf, "Most Immigrants with Deportation Letters Are Still in Canada, CBSA Figures Show," *Globe and Mail*, 13 February 2024, <https://www.theglobeandmail.com/politics/article-most-immigrants-with-deportation-letters-are-still-in-canada-cbsa/>.

undocumented migrants in Canada who are contributing to Canadian communities.³⁷ Since then, successive ministers have said work is ongoing on a plan, with the minister indicating recently that it would not emerge soon due to disagreements within the Cabinet.³⁸

Pre-Removal Detention: Length, Conditions, and Oversight

Most detention decisions must be reviewed by the Immigration Division of the Immigration and Refugee Board within forty-eight hours, then after seven days and every thirty days thereafter.³⁹ However, if a person is a “designated foreign national” or is named in a security certificate, ongoing reviews of their detention are only required every six months after the initial review.

The concept of a designated foreign national was introduced in 2012 by the Conservative government. It empowers the Minister of Public Safety to make such a designation if there are reasonable grounds to suspect that a person’s arrival was associated with a

37 Holly McKenzie-Sutterholly, “Migrants across Canada Call on Ottawa for Action on Regularization, Permanent Status,” *CTV News*, 18 September 2022, <https://www.ctvnews.ca/canada/migrants-across-canada-call-on-ottawa-for-action-on-regularization-permanent-status-1.6073893>; Jill Macyshon, “Canada Is Deporting More People Faster, Drawing Concern from Migrant Advocates,” *CTV News*, 8 December 2023, <https://www.ctvnews.ca/canada/canada-is-deporting-more-people-faster-drawing-concern-from-migrant-advocates-1.6678779>.

38 Marie Woolf, “Ottawa Split on Plan to Let Undocumented Migrants Apply to Stay in Canada,” *Globe and Mail*, 24 June 2024. The minister had announced in December 2023 that he would be presenting a plan to the Cabinet in the spring of 2024. Marie Woolf, “Ottawa Plans to Create Canadian Citizenship Path for Undocumented Immigrants,” *Globe and Mail*, 14 December 2023, <https://www.theglobeandmail.com/politics/article-canadas-immigration-minister-plans-broad-program-to-allow-immigrants/>.

39 *Immigration and Refugee Protection Act*, S.C. 2001, s. 57 and s. 57.1; Canada Border Services Agency Government of Canada, “Detentions and Alternatives to Detention,” last updated 30 May 2024, <https://www.cbsa-asfc.gc.ca/security-securete/detent/menu-eng.html>.