

**INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW
14TH INTERNATIONAL CONFERENCE, SANDTON, SOUTH AFRICA
3 – 7 DECEMBER 2000**

Human Rights and the Administration of Criminal Justice

**“CONSTITUTIONAL CHALLENGES TO THE DIFFERENTIAL
TREATMENT OF CANADIAN AND NON-CANADIAN CITIZENS IN
CANADIAN PRISONS” SESSION C1**

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INTRODUCTION

Canadian law and policy discriminates in its treatment of Canadian citizens and non-citizens who have been convicted of alleged serious criminal offences and who have been sent to gaol. I argue that this distinction is unconstitutional as contrary to sections 7 and 15 of the Canadian Charter of Rights and Freedoms that respectively provide for the maintenance of principles fundamental justice and against any kind of discrimination.

The discrimination is particularly repugnant because the trigger to the differential treatment is a conviction under the Criminal Code of Canada but the resulting differential treatment is justified under the Immigration Act. The Immigration Act is not applicable to Canadian citizens.

Canadian citizens and non-citizens may be charged for a similar offence and may even be given a similar sentence but the treatment in prison and length of sentence may be vastly different.

Before conviction, non-citizens may be placed under immigration detention. They have thus to be bailed out both under the Criminal Code as well as under the Immigration Act. The Immigration Act poses tremendous problems for non-citizens who are not wealthy or who have committed allegedly abominable offences. They may get criminal bail but be denied immigration bail. Some languish in detention until their trials several months down the road.

After conviction for allegedly serious offences all non-citizens are subject to an immigration inquiry and deportation order. Some get removed from the general population and sent into segregated detention without reason. The excuse is that these individuals are under immigration investigation. Immigration invariably denies this

allegation. They continue to be held in segregated detentions. While in segregated detention, they miss out on the programs they were doing, they are denied physical exercise, they miss out on their parole hearings, they cannot pursue bails pending appeal and so on. They are generally treated as dangerous when they are not.

Until relatively recently, non-citizens who were under immigration detention while serving their sentences were not entitled to parole hearings and possible release. Even now, paroled non-citizens may continue to be held in prison under immigration detention until they finish their sentences and face removal from Canada. Citizens would have long been released under parole.

Non-citizens may also be declared to pose danger to the public under the Immigration Act for offences that citizens would not remotely be considered to be dangerous or long-term offenders if they were convicted for the same offences under the Criminal Code. The declaration that a non-citizen poses danger triggers further differential treatment for non-citizens in prison under the Immigration Act.

To demonstrate the differential treatment of non-citizens who have been convicted of alleged serious offences, I select two actual cases that I did and that challenged the constitutionality of this differential treatment. These cases also show the legal maze through which a non-citizen has to pass to challenge his treatment and the difficulties of navigating the legal arenas.

One case deals with legal challenges to continued detention of a non-citizen who had been paroled. This was filed in Federal Court. The second deals with the issue of danger to the danger declaration. This case was filed in the Supreme Court of Canada.

The first was dismissed, albeit that the judge found that the Adjudicator had committed several legal errors.

The second has not been disposed of by the Supreme Court of Canada as of this paper. These cases are given merely as examples among numerous problems faced by non-citizens of Canada. My oral presentation will supply the meat and bones of the issues in these and other cases.

