Collateral Immigration Consequences in Sentencing: A Mitigation of Offender Moral Blameworthiness?

Brennan Carlson*

This paper critically examines the implications of the Supreme Court of Canada's (SCC) 2013 decision in R v Pham regarding collateral immigration consequences in sentencing and how these considerations impact the moral blameworthiness of non-citizen offenders. The ruling allows sentencing judges to factor immigration-related repercussions into their sentencing decisions, which has led to critical inconsistencies. This paper argues that such factors often result in disproportionate sentences, effectively diminishing the severity of punishment relative to the crime. The potential for collateral immigration consequences to unduly influence judicial discretion undermines the core sentencing principles of proportionality and accountability. As such, the current framework requires re-evaluation to restore retributivist sentencing practices. Legislative reform or clearer guidelines from the SCC may be necessary to ensure that sentences adequately reflect the gravity of offences committed. Without such changes, this growing disparity could attract public dissatisfaction and further legal complication.

* Brennan Carlson is a third-year student at Robson Hall Faculty of Law, University of Manitoba. Brennan holds a Bachelor of Arts (Honours) in Political Science from the University of Winnipeg and a Master of Arts Degree in Political Studies from the University of Manitoba. Following the completion of his legal studies, Brennan will be articling at the Legal Services Branch with Manitoba Justice. He hopes to pursue a career as a Crown Attorney.

I. Introduction

Since the SCC seminal 2013 decision in *R v Pham,* the immigration status of an offender can be considered by a sentencing judge when crafting a fit and proportionate sentence.[1] The SCC further held that immigration concerns can be raised before an appellate court if they were not presented to the trial judge at sentencing. Collateral immigration consequences refers to those additional immigration-related problems faced by a non-citizen that arise out of a criminal conviction.[2] In light of *Pham*, courts across Canada have cited collateral immigration consequences to reduce sentences that, if not reduced, would have resulted in immigration-related repercussions.[3] For example, a reduced sentence was provided in *R v Singh*, where the trial judge concluded that the offender should receive a discharge and three years of probation "in consideration of the devastating collateral immigration consequences to recording a conviction."[4]

As such, this paper will explore to what extent the incorporation of collateral immigration consequences in sentencing decisions mitigates offender moral blameworthiness. Ultimately, it will be contested that the inclusion of collateral immigration consequences in sentencing tends to lead to disparate results that often diminish offender moral blameworthiness to such an extent that a re-evaluation of how *Pham* is being applied across Canadian courts is required. These issues also highlight a growing tension

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1 See generally *R v Pham*, 2013 SCC 739 [*Pham*].

2 See A. Gerami & N. Ranger, "Pham, Immigration Consequences and Fairness in Sentencing" (2013) 2:1 *The Last Line, Magazine of Defence Counsel Association of Ottawa* at pp 11-13 [Gerami & Ranger].

3 See S. Baglay, "Collateral Immigration Consequences in Sentencing: A Six-Year Review" (2019) 82:1 *Saskatchewan Law Review* at pp 7-10 [Baglay 2019]; See generally A. Esnaashari, "Immigration Consequences for Permanent Residents Convicted of a Criminal Offence in Canada" (2017) https://esnalaw.com/wp-content/uploads/2023.

4 *R v Singh*, 2024 ABCJ 2 at para 31.

between the distinct legal regimes of sentencing and immigration legislation. The consequences of this issue may necessitate a return to a more retributivist approach to sentencing that curtails the weight given to considerations of collateral immigration consequences. It is argued that in doing so, sentencing in such situations can be brought back in line with section 718 of the *Criminal Code*.[5] This will also help to ease the growing tension between the sentencing process and immigration policy objectives, which have been inflamed by *Pham*. Solving these issues will require guidance by either the higher courts, such as the SCC, or by Parliament, to address how *Pham* is being applied across Canada and to ensure that its application is in accordance with sentencing principles and public expectations.

This paper will first begin with a brief introduction and a general outline of the succeeding analysis. It will then overview the necessary analytical background information required for the analysis. This overview will include a discussion of *Pham*, the introduction of collateral immigration consequences in sentencing, and their effects on the *Immigration and Refugee Protection Act* (IRPA).[6] In the subsequent section, this paper will then examine the pertinent case law since *Pham,* and seek to demonstrate that the introduction of collateral immigration consequences in sentencing decisions ultimately has led in many cases to outcomes that do not fulfil the objectives of section 718 of the *Criminal Code*.[7] After this, there is an exploration of how a retributivist theory of punishment may be used to mitigate some of the arguably negative consequences of *Pham*, along with some other possible solutions to these issues. Finally, this paper will conclude with some final considerations on these matters.

5 *Criminal Code*, RSC 1985, c C-46 at s 718 [*Criminal Code*].

6 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

7 See *Criminal Code* at s 718.

II. *R v Pham*, the Introduction of Collateral Immigration Consequences in Sentencing, and their Effects on the *Immigration and Refugee Protection Act*

Put simply, the intersection between Canadian criminal law and immigration law is both significant and broad. As such, the scope of this paper will predominantly focus on the interaction of the criminal law with two major types of non-Canadian residents: foreign nationals and permanent residents. Canadian immigration law will prevent a foreign national from gaining admission to Canada on the grounds of either criminality or serious criminality.[8]

The term 'foreign national' encompasses "anyone that is in Canada for a temporary purpose and may include a visitor on a work or study permit."[9] Criminality indicates "a conviction of any offence under an Act of Parliament which is punishable by way of indictment or the conviction of two offences under any Act of Parliament, so long as they do not arise out of a single occurrence."[10] Finally, serious criminality is in reference to the "conviction of an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of 10 years, or the conviction of any offence under an Act of Parliament where a term of imprisonment of more than six months has been imposed."[11]

Generally, a foreign national will also face possible deportation if they are convicted of an offence punishable by indictment or if they are convicted of

8 See generally M. Hughes, "Collateral Consequences: Immigration Consequences of Criminal Law" (6 July 2023) https://coxandpalmerlaw.com/publication [Hughes].

9 Hughes.

10 *IRPA* at s 36(1).

11 *IRPA* at s 36 (2).

two offences.[12] Usually, foreign nationals do not retain the right to appeal a deportation order. In contrast, a permanent resident will lose admissibility to Canada only on the grounds of serious criminality.[13] A permanent resident is defined as someone who does not hold Canadian citizenship (they are usually a citizen of another country) but has been given Permanent Resident status by the Canadian Government.[14]

For permanent residents, the consequences of becoming inadmissible to Canada on the grounds of serious criminality is the loss of their status along with possible deportation without the right to appeal.[15] Permanent residents may still face deportation even if their criminal behaviour does not meet the definition of serious criminality, but they will generally retain their ability to appeal a deportation order in such a scenario. Both foreign nationals and permanent residents can also lose admissibility to Canada on the grounds of organized criminality (transnational crime, for instance).[16] These groups will also lose their right to appeal a deportation order on such a basis.[17] The chart below provides visual clarification of these processes.[18]

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12 Hughes.

13 Hughes.

14 Hughes.

15 Canadian Council for Refugees, "Permanent Residents and Criminal Inadmissibility: Resource for Front-Line Workers" (October 2018) https://ccrweb.ca/sites/ccrweb.ca/files [CCR].

16 *IRPA* at s 37.

17 *IRPA* at s 64(1).

18 A. Navaneelan, *Immigration Consequences of Criminal Dispositions and Sentencing* (Legal Aid Ontario, April 2016) https://legalaid.on.ca at p 30 [Navaneelan].

Figure 1: Consequences of Different Criminality Findings Under the Immigration and Refugee Protection Act

	Foreign National	Permanent Resident or Protected Person (non-Canadian Citizen)
Criminality: Deportable with No Right of Appeal	Yes	No (appeals and remedies are available)
Serious Criminality: Deportable with No Right of Appeal	Yes	Yes
Organized Criminality: Deportable with No Right of Appeal	Yes	Yes

Following the conviction of a foreign national or a permanent resident, the police will send the offender's information to the Canada Border Services Agency (CBSA) to determine if they will be deported or lose their status.[19] While a foreign national usually does not have a right to appeal their deportation order in any situation, a permanent resident can in some cases appeal to the Immigration and Refugee Board of Canada's (IRB) Immigration Appeal Division (IAD).[20] The IRB is an independent administrative tribunal responsible for decision-making in relation to

19 Toronto Criminal Lawyers, "Non-Canadian Citizens Face Deportation for a Criminal Conviction," https://torontocriminallawyers.com/article/.

20 Immigration and Refugee Board of Canada, "About the Board" (23 April 2024) https://irb-cisr.gc.ca/en/board/Pages/index.aspx [IRB].

immigration matters while the CBSA will enforce and carry out those decisions.[21]

Critically, if a permanent resident is sentenced to prison for six months or more, they will lose their right to appeal a deportation order.[22] This is important as a permanent resident can raise various considerations such as humanitarian factors as to why they should not be deported at an IAD hearing.[23] These humanitarian factors may include such things as the length of time they have spent in Canada, if they have families or children who were raised in Canada, or if they are suffering from mental health conditions.[24] It should also be noted that conditional sentence orders and discharges are not considered a "term of imprisonment for the purpose of serious criminality."[25] In contrast, a suspended sentence can result in a permanent resident losing their right to appeal a removal order.[26] Ultimately, if a permanent resident loses their right to appeal a removal order, the only remaining legal redress for them is to file an application for judicial review with the Federal Court, or to file an application with the Department of Immigration, Refugees and Citizenship Canada (IRCC).[27] Although complex, the following chart

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21 IRB.

22 See generally Hughes.

23 See CCR.

24 CCR.

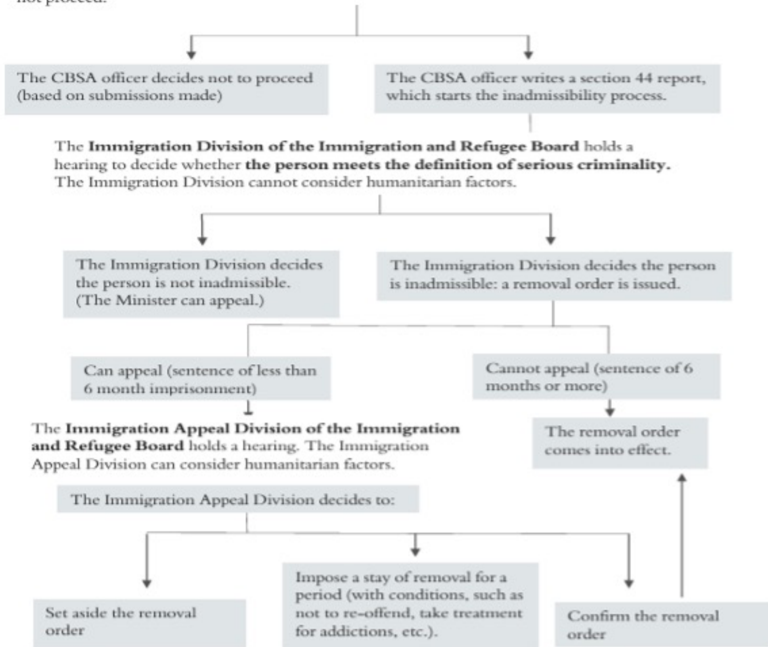
25 *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50. See also Hughes.

26 S. Karas & R. Goel, "Canada – Immigration Consequences of Criminal Sentences and Discharges" (Spring 2022) https://karas.ca/publications.ca/publications/ [Karas & Goel].

27 While the IRB is independent of the IRCC, it still reports to Parliament through the IRCC. See generally IRB, and Karas & Goel.

illustrates the administrative and legal process that a permanent resident who has been convicted of an offence constituting serious criminality faces.[28]

Figure 2: Criminal Inadmissibility and Permanent Residents: The Process



With these background factors in mind, the SCC in *Pham* ultimately made it clear that a sentencing judge "may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender."[29] In addition to considering the

28 See CCR.

29 *Pham* at para 14.

collateral immigration consequences facing an accused, the SCC further stated that an "appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue."[30]

In *Pham*, the offender was a non-citizen charged and convicted for "producing and possessing marijuana for the purpose of trafficking"[31] and was subsequently sentenced to two years' imprisonment. At the time, this triggered a deportation order and the loss of the offender's ability to appeal the order under the IRPA.[32] The offender successfully appealed this decision to the SCC where it was found that the sentencing judge had not taken into consideration the offender's immigration situation when crafting a fit and proportionate sentence.[33] As such, the SCC reduced the sentence by a single

30 *Pham* at para 24.

31 Legally Canadian, "R v Pham, 2013 SCC 15: It is Appropriate to Consider Deportation Order as a Factor in Reducing Sentencing" https://legallycanadian.com/articles/r-v-pham-2013-scc-15 [Legally Canadian].

32 Bill C-43 [*The Faster Removal of Foreign Criminals Act*] passed shortly after the decision in *Pham*. Prior to Bill C-43, a non-citizen could appeal their deportation order with the IAD if they received a sentence of imprisonment that did not surpass two years. Following the passing of this bill, a permanent resident offender can now only appeal a deportation order as long as their sentence of imprisonment does not exceed six months. See National Law Immigration Law Section, *Bill C-43, Faster Removal of Foreign Criminals Act* (Canadian Bar Association, November 2012).

33 H. Gardiner, "Immigration Consequences can affect Sentencing, SCC Rules" *Canadian Lawyer* (14 March 2013) https://canadianlawyermag.com/news/general/immigration-consequences-can-affect-sentencing-scc-rules/.

day so that the offender would not lose their right to appeal the deportation order under the IAD.[34]

The decision in *Pham* ultimately brought greater recognition to the way in which criminal law and immigration law intersects; particularly in that criminal sentences of a specific length can "trigger additional immigration consequences for non-citizens, including the potential for deportation."[35] As such, collateral immigration consequences, in the context of the criminal law, generally refer to three main consequences under the IRPA: (1) a declaration of inadmissibility to Canada; (2) a deportation order; and (3) the removal of the ability to appeal a deportation order with the IAD.[36] Consequently, an accused must be aware of any potential immigration ramifications before entering a guilty plea, while a sentencing judge must consider collateral immigration consequences prior to crafting a sentence.[37]

The SCC stated in *Pham*, "collateral immigration consequences are but one relevant factor among many others related to the nature and gravity of the offence," therefore a sentencing judge is not, *per se*, compelled to "adjust a sentence in order to avoid the impact of collateral immigration consequences on the offender."[38] The SCC also emphasized that a sentence for a non-citizen offender must still be proportionate and in parity with similar sentences for that particular offence.[39] Put another way, the

34 See Legally Canadian.

35 British Columbia Civil Liberties Association, "R. V. Pham (Supreme Court of Canada)" (16 January 2013) https://bccla.org/case/r-v-pham-supreme-court-of-canada/.

36 M. Street, "Collateral Immigration Consequences" *BarTalk* (1 February 2019) https://bartalk.org/article/features/2019-02/collateral-immigration-consequences/ [Street].

37 Street.

38 See generally Legally Canadian.

39 *Pham* at para 18.

"fundamental principle of proportionality must prevail in every case."[40] Sentences in these situations must thus remain within the relevant sentencing ranges while also considering factors such as rehabilitation prospects, moral blameworthiness, and the individual characteristics of the offender.[41]

While the precedent set by *Pham* appears reasonable and prudent in itself, it is ultimately how the principles of this case have been applied in subsequent decisions that has proven to be arguably problematic.

A. The Legislative Logic of the Immigration and Refugee Protection Act and Its Structural Tension with Sentencing Principles

Before delving into the pertinent case law, a more robust understanding of the implications of *Pham* requires a closer examination of the legislative architecture of the IRPA and the policy logic that underpins its criminal inadmissibility regime. Parliament has clearly designed the IRPA to impose consequences on non-citizens who commit certain categories of offences, with the explicit objective of protecting the public and ensuring the timely removal of individuals deemed to pose a risk to Canadian society.

These consequences are independent of the criminal sentencing process and are triggered not by judicial assessments of moral blameworthiness, but by statutory thresholds tied to the nature of the offence and the length of the sentence imposed.[42] Under sections 36 and 37 of the IRPA, the distinction between 'criminality,' 'serious criminality,' and 'organized criminality' reflects an escalating framework of immigration consequences for increasingly severe

40 *R v Suter*, 2018 SCC 34 at para 56.

41 *Pham* at para 8.

42 C. Vinayak, "Immigration Consequences of Criminal Convictions in Canada: Recent Case Law Developments" (1 May 2025) https://cila.co/immigration-consequences-of-criminal-convictions.

levels of criminal behavior.[43] The six-month custodial threshold, which is a critical factor for permanent residents, was introduced through Bill C-43 to expedite the removal of non-citizens convicted of more serious offences by eliminating their right of appeal to the IAD.[44]

Arguably, Parliament's intention was to create a clear, administratively efficient mechanism for removal of non-citizens, one that does not depend on individualized assessments of rehabilitation, hardship, or family circumstances unless the offender remains eligible to access the IAD's humanitarian avenues of relief. In this sense, IRPA's structure is intentionally rigid in that it creates clear consequences for criminal actions, thus prioritizing public safety.

This legislative design sits uneasily alongside the discretionary, individualized nature of criminal sentencing under section 718 of the *Criminal Code*. Sentencing judges are required to impose a punishment proportionate to the gravity of the offence and the offender's moral blameworthiness, guided by principles of parity, denunciation, deterrence, and rehabilitation. These principles are offender-centric and grounded in shared morals. By contrast, IRPA consequences are status-centric and risk-oriented. They are designed purely for immigration policy objectives.[45] One may clearly observe that these two systems operate on different normative logics: one moral and individualized, one administrative.

Perhaps it is this underlying structural inconsistency that creates the tension exposed in the application of *Pham*. When sentencing judges artificially adjust otherwise fit sentences to avoid triggering IRPA consequences, they conflate these two separate regimes which leads to

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43 *IRPA* at ss 36-37.

44 Bill C-43, *An Act to amend the Immigration and Refugee Protection Act*, 41st Parl, 1st Sess, 2013 (assented to 19 June 2013), SC 2013, c 16.

45 *IRPA* at s 3.

untenable outcomes. The different thresholds embedded in IRPA begin to exert undue influence on the sentencing process, thereby encouraging judges to treat immigration consequences as if they were the overarching principle in the proportionality analysis at sentencing. *R v Chugh* warns of this dynamic:

> [The] flexibility in sentencing should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences, thus circumventing Parliament's will in other legislation.[46]

A deeper understanding of IRPA's legislative goals therefore clarifies why the overemphasis on collateral immigration consequences is problematic. Evidently, this is a structural incompatibility between two separate legal processes with fundamentally different purposes that is exasperated through an inconsistent application of *Pham*.

As such, sentencing cannot be unduly altered to avoid triggering IRPA consequences. Doing so impacts the integrity of the criminal sentencing process and impedes the immigration objectives of Parliament. While a court should "strive to reach a proportionate sentence by considering collateral consequences, it must not sacrifice a fit sentence in the process."[47] While it is acknowledged that the SCC in *Pham* did not desire to institute a parallel system of sentencing that is unduly influenced by immigration-related matters, the subsequent section highlights how lower courts appear to be drifting in this direction.[48]

46 *R v Chugh*, 2020 ABPC 247 at para 18.

47 *R v Mann*, 2025 ONJC 486 at para 77.

48 *Pham* at paras 13-16.

III. R v Pham and the Incorporation of Collateral Immigration Consequences: Problems, Inconsistencies and Additional Considerations

While the decision in *Pham* recognized the significance of collateral immigration consequences in sentencing decisions for non-citizens, the way in which Canadian courts have sought to apply the principles of *Pham* has not come without its issues.[49] As Baglay recalls:

> *Pham* also left several issues unclear, making the application of its framework challenging. Over time, lower courts found ways to address some of these gaps. For example, they developed two methodological approaches to the consideration of immigration consequences…it appears that *Pham* is interpreted and applied differently in the context of cases with fit sentences around six months versus those with fit sentences well over six months.[50]

Consequently, in relation to crimes whose punishment is typically well over the six-month incarceration range, collateral immigration consequences were rarely considered as there would be no right available to appeal a deportation order with the IAD.[51] Reducing a sentence below six months solely to avoid immigration consequences can be viewed as an improper and excessive departure from the typical punishment range, making the stricter approach appropriate in such cases.

Contrastingly, for sentences that are typically in and around the six-month range, collateral immigration consequences played a much more significant role in determining the sentencing outcome.[52] This is likely because of the right to appeal a deportation order with the IAD being more explicitly at stake. Ultimately, it is within these types of cases where the

49 See especially Baglay 2019 at p 41.

50 Baglay 2019 at p 41.

51 Baglay 2019 at p 42.

52 Baglay 2019 at pp 41-42.

application of the principles from *Pham* have arguably produced problematic outcomes. This is because the underlying structural tension between two separate legal regimes, as described above, is more likely to be present in such cases. Taking a closer look at the relevant case law may evince the presence of this dynamic.

A. Critical Analysis of Pertinent Case Law

In *R v Yare*, a case from the Manitoba courts, the accused was a permanent resident who plead guilty to the offences of flight from police by motor vehicle, two counts of uttering threats, and failing to comply with a recognizance.[53] The accused, who had a prior record for assault with a weapon and assaulting a police officer, deliberately rammed a police car at a traffic stop and fled the scene.[54] Following his release on bail conditions, the accused was again arrested for breach of bail conditions.[55] The Crown sought a sentence of 18 to 19 months' incarceration. Defense counsel instead proposed a sentence that would incorporate the 179 days of pre-sentence custody the accused had accumulated, thereby avoiding a total sentence exceeding the IRPA's six-month threshold.[56]

The sentencing judge, while acknowledging the "importance of the principles of deterrence and denunciation," also recognized that a "sentence greater than six months might result in the accused's deportation from Canada."[57] After imposing a sentence of five months and 25 days' incarceration, the sentencing judge further stated that "I am not inclined to subject you to deportation hearings, but you need to know how lucky you

53 *R v Yare*, 2018 MBCA 114 at paras 2, 4 [*Yare*].

54 *Yare* at paras 9, 25.

55 *Yare* at para 5.

56 *Yare* at paras 7-8.

57 *Yare* at para 9.

are."[58] The sentencing judge had further stated that the accused "ought to be jailed for about a year for these charges."[59] The Crown subsequently appealed the decision to the Manitoba Court of Appeal (MBCA) contesting that the sentencing judge had "erred in his assessment of the relevant factors by placing undue weight on collateral immigration consequences".[60] The MBCA allowed the appeal and imposed a new sentence of 13 months and ten days incarceration.[61] Critically, the MBCA stated that:

> In our view, the sentencing judge imposed an artificial sentence in order to circumvent Parliament's will and, in doing so, he erred in principle by overemphasizing the collateral consequences. Moreover, reducing the sentence by more than six months from what he considered appropriate to avoid immigration consequences resulted in a sentence that is not proportionate having regard to the circumstances of the offence and the moral culpability of the offender.[62]

The sentence imposed by the lower court fell within the permissible range for the offences, albeit on the low end. However, the accused's deliberate conduct and high moral culpability warranted prioritizing the sentencing principles of denunciation and deterrence. These principles should have remained the primary objectives in this case, regardless of whether doing so would have resulted in significant collateral immigration consequences.[63]

Ultimately, in *Yare*, the sentencing judge explicitly acknowledged that a proportionate sentence for the offender's conduct—deliberately ramming a police vehicle, fleeing from police, and breaching bail—would have been

58 *Yare* at para 12.

59 *Yare* at para 10.

60 *Yare* at paras 2, 13.

61 *Yare* at para 29.

62 *Yare* at para 23. See also *R v Stampp*, 2022 BCCA 408.

63 *Yare* at paras 23-28.

approximately one year of incarceration. Yet, the sentencing judge reduced the sentence to five months and twenty-five days to preserve the offender's right to appeal a removal order. Arguably, this reduction was not grounded in the offender's moral culpability, prospects for rehabilitation, or any mitigating personal circumstances. Rather, it appears that it was driven almost entirely by the six-month IRPA threshold. The MBCA correctly identified this as an 'artificial sentence,' one that subordinated the proportionality principle to immigration consequences.

The finding in *Yare* appears to be in accordance with similar appellate court decisions in Canada. In *R v Lopez-Orellana*, a case from the Alberta Court of Appeal (ABCA), the appellant asked for a reduction of four months and one day from a global sentence of 10 months to avoid facing collateral immigration consequences.[64] However, the ABCA dismissed this appeal and stated that such a reduction would "render this an unfit sentence and one that is inconsistent with the fundamental purpose and principles identified in the *Criminal Code*."[65]

The sentencing judge in *Yare* put too much emphasis on collateral immigration consequences which ultimately resulted in an initial sentence that was not fit and proportionate to adequately address the accused's moral culpability and denounce their actions. The overemphasis on the accused being deported as a result of a sentence in excess of six months was the primary catalyst in this case for the imposition of a sentence that was disproportionate to the gravity of the offence.[66]

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64 *R v Lopez-Orellana,* 2018 ABCA 35 at para 28 [*Lopez-Orellana*].

65 *Lopez-Orellana* at para 28.

66 *Yare* at para 13; See also M. Forrest, "Judge Gave Excessively Light Sentence to Avert Deportation of Refugee who Threatened to Kill Police: Appeal Court" *National Post* (19 November 2018) https://nationalpost.com/news/canada/ judge-gave-excessively-light-

Yare thus illustrates how *Pham* brings to the forefront IRPA's rigid administrative thresholds. These thresholds distort the sentencing process by exerting external pressure on judicial discretion. They encourage judges to treat immigration consequences as if they were part of the culpability analysis, when they are not.

Similarly, the British Columbia Court of Appeal (BCCA) found that the sentencing judge in *R v Lee* reduced a sentence to the point that it was disproportionate to the gravity of the offence and the moral blameworthiness of the offender.[67] In this case, the offender was a permanent resident who had stabbed the victim twice and pursued him, thus causing critical injuries.[68] The sentencing judge had imposed a conditional sentence order of two years less a day in order for the offender to preserve their right to appeal a deportation order under IRPA.[69] The Crown on appeal contested that the "judge was led into error by attempting to preserve the respondent's right of appeal, resulting in a demonstrably unfit sentence."[70] The BCCA agreed and imposed a custodial sentence of three and a half years while noting that the sentencing judge "used the collateral immigration consequences at issue here to reduce the respondent's sentence to the point where it became

sentence-to-avert-deportation-of-refugee-who-threatened-to-kill-police-appeal-court.

67 *R v Lee*, 2025 BCCA 292 [*Lee*].

68 *Lee* at paras 4-5.

69 *Lee* at paras 20-21. While a conditional sentence order would not be treated as a term of imprisonment under IRPA, it would still entail a criminal conviction which would trigger possible deportation under the IRPA category of non-serious criminality. However, a permanent resident would still retain their right to appeal deportation in this case.

70 *Lee* at para 21.

disproportionate to both the gravity of the offence and the moral blameworthiness of the offender."[71]

While the misapplication of collateral immigration consequences may be appealed and rectified in some cases, this ultimately takes time and resources to pursue. These appellate court decisions still demonstrate a general problem amongst the lower courts regarding the application of collateral immigration consequences.

This pattern appears common across Canada. In *R v J.S.*, a case from the British Columbia Provincial Court, the accused plead guilty to sexual assault and forcible confinement of two separate underage women.[72] The offender was a foreign national studying in British Columbia on a student visa and was thus subject to becoming inadmissible to Canada on the grounds of criminality if they received a criminal record as a result of a conviction in this case.[73] The trial judge ultimately imposed a conditional discharge following the completion of twenty-four months of probation so as not to leave the offender with a criminal record which would jeopardize his immigration status.[74]

Indeed, conditional discharges do not trigger sanctions within the IRPA. [75] While deciding between the Crown's recommendation of a suspended sentence ranging to a conditional sentence, and defence counsel's recommendation of a conditional discharge, the trial judge stated that the "imposition of a criminal record is the key issue in this case because that would very likely jeopardize J.S.'s ability to remain in Canada."[76]

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71 *Lee* at para 38.

72 *R v JS*, 2020 BCPC 213 at paras 7-12 [*JS*].

73 *JS* at paras 1-6.

74 *JS* at para 73.

75 *JS* at para 29.

76 *JS* at para 6.

In coming to this decision, the trial judge applied the two-step common law test for granting a conditional discharge as set out in *R v Fallofield*.[77] This test dictates that a conditional discharge firstly must be found to be in the best interests of the accused and secondly it must also not be contrary to the public interest.[78] The first step of the test was satisfied as being able to remain in Canada was clearly found to be in the best interests of the accused.[79] Regarding the second half of the test, an analysis of the public interest "requires a nuanced and contextual assessment of a variety of factors" such as public safety, the protection of vulnerable peoples, rehabilitation, and denunciation and deterrence.[80]

It is not exactly clear how the trial judge deemed that it would be in the public interest to impose a conditional discharge for the offender, thus preventing the offender from receiving a criminal record and a possible deportation order. On one hand, the trial judge stated that he was "not persuaded that J.S. truly understands the impact his behaviour has had on the two young women involved in these incidents,"[81] while on another he stated that the offender's "unique perspective as an individual from another country will allow him to help others and become a contributing member of this community."[82] Needless to say, it is uncertain how the public will benefit from the perspective of an offender of this nature.

Given that these were deliberate actions taken against vulnerable underage females by an offender who had entered Canada to pursue further education, it is not exactly clear how the public interest is being upheld in

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77 *R v Fallofield*, 1973 BCCA 472 [*Fallofield*].

78 *Fallofield*.

79 *JS* at para 40.

80 *JS* at para 63.

81 *JS* at para 56.

82 *JS* at para 72.

this case. It appears that the lingering presence of collateral immigration consequences played a decisive role in the trial judge's decision to grant J.S. a conditional discharge, thus preventing the commencement of additional actions under the IRPA.

The trial judge's reasoning made clear that the decisive factor was the desire to avoid a criminal record that would render the offender inadmissible to Canada. The public-interest analysis under *Fallofield* was reframed around immigration consequences rather than the seriousness of the offences or the vulnerability of the victims. The result was a sentence that shielded the offender from IRPA consequences at the expense of denunciation, deterrence, and public confidence in the administration of justice. *J.S.* demonstrates how the gravitational pull of collateral immigration consequences can lead courts to prioritize the preservation of immigration status over the moral evaluation of the offence, even in cases involving significant harm to vulnerable persons.

In *R v Singh*, of which is a recent decision by the Alberta Court of Justice (ABCJ), collateral immigration factors were even more pronounced.[83] The offender in this case was on a visitor permit when they sexually assaulted a female in a Calgary bar.[84] After being found guilty of sexual assault at trial, the primary issue at sentencing was "determining a fit sentence" for the offender who had committed a "brazen" sexual assault, while also weighing the collateral immigration consequences.[85] Since a conviction in this case would result in a criminal record and deportation without the right to appeal, the trial judge again opted for the imposition of a conditional discharge.[86]

83 *R v Singh*, 2024 ABCJ 2 [*Singh*].

84 *Singh* at paras 3-20.

85 *Singh* at para 1.

86 *Singh* at paras 10, 31. This is because the Crown elected to proceed by indictment, which, upon conviction, would subject the offender, a foreign

As the trial judge explained, in "consideration of the devastating collateral immigration consequences to recording a conviction, I conclude that the appropriate sentence for Mr. Singh is a conditional discharge with a probation order of maximum duration, 3 years."[87]

In *Singh*, it appears once again that the sentencing judge overemphasized the significance of collateral immigration consequences when considering an appropriate sentence. While the collateral immigration consequences for the offender in this case would have been significant, they should not have been used to diminish the overall moral blameworthiness of the offender. The trial judge openly acknowledged that a conviction would lead to deportation without the right to appeal and described these consequences as 'devastating.'[88] The trial judge's reasoning arguably did not adequately explain how a discharge - ordinarily reserved for offenders whose conduct is minor, aberrational, or unlikely to be repeated - could be reconciled with the seriousness of the offence.

Instead, the conditional discharge conceivably functioned as a mechanism to avoid IRPA's mandatory removal threshold. This outcome underscores how the structural tension between IRPA and sentencing principles is exacerbated by the concept of collateral immigration consequences. That tension can in turn lead to sentences that diverge sharply from proportionality and moral blameworthiness. This dynamic creates the appearance of a dual sentencing system: one for citizens and one for non-citizens.

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national, inadmissible on grounds of criminality under *IRPA*. This would then trigger deportation without the right to appeal. See *IRPA* at s 2(a).

87 *Singh* at para 31.

88 *Singh* at paras 10, 23.

In the case of *R v Khant*,[89] the offender was a permanent resident who had been apprehended as a result of Project Juno, which was an anti-human trafficking sting operation in Ontario designed to target those attempting to obtain sexual interactions with underage teens.[90] The Crown sought a 90 day custodial sentence which was "consistent with the sentences imposed on others involved in Project Juno."[91] The Defence proposed a conditional discharge, "accompanied by 12 months' probation with strict conditions, including a three-month period of house arrest."[92] The sentencing judge in this case ultimately opted for the conditional discharged propose by Defence Counsel. In deciding this, the sentencing judge stated that "a conviction would lead to severe collateral consequences, such as jeopardizing his immigration status, delaying his citizenship, and preventing him from sponsoring his wife, which would likely result in their separation. [93] Interestingly, the Crown referenced R v *Faroughi*,[94] a case with a similar fact pattern, where a discharge and suspended sentence were deemed to not be appropriate (a custodial sentence was emphasized).

However, the sentencing judge viewed *Khant's* collateral immigration consequences to be "far more severe than those faced by Mr. Faroughi, who was a Canadian citizen with no such vulnerabilities...courts have recognized that such consequences can justify a more lenient sentence, including a

89 *R v Khant*, 2025 ONJC 352 [*Khant*].

90 Postmedia News, "Windsor, Essex Men Among Staggering 1,100 Men in Ontario Inquiring About Sex with Kids in Police Sting" *Windsor Star* (31 July 2025) https://windsorstar.com/news/ local-news/windsor-essex-men-among-staggering-1100-men-in-ontario-inquiring-about-sex-with-kids-in-police-sting.

91 *Khant* at para 37.

92 *Khant* at para 2.

93 *Khant* at para 61.

94 *R v Faroughi*, 2024 ONCA 178.

discharge."[95] Without undue speculation, it appears plausible then that *Khant* may have received a custodial sentence if he had a Canadian citizenship.[96] A desire to avoid IRPA consequences again appeared to be the primary sentencing principle here.

These factors are again shown in the case of *R v Kovac*.[97] Here, the offender was a permanent resident who was operating a motor vehicle while severely intoxicated and caused serious injuries to the victim. While the Court of Quebec (QCCQ) acknowledged that "severe sentences are particularly important for offences involving impaired driving given the huge societal problem that impaired driving represents," the offender was still granted a conditional sentence order of 18 months.[98] The QCCQ explicitly acknowledged that a conditional sentence will "preserve the accused's right to appeal the finding of inadmissibility under the IRPA which will flow from his conviction."[99]

Again, one can observe the undue influence of IRPA thresholds within the sentencing process. While a conditional sentence order is intended to be a form of imprisonment, it is to be served in the community, not in the correctional system. Whether or not an individual who is not facing collateral immigration consequences would be afforded a conditional sentence in this case is uncertain.

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95 *Khant* at para 51.

96 J. Sarkonak, "Non-Citizen Johns Shouldn't get Sentence Discounts for their Crimes" *National Post* (15 July 2025) https://nationalpost.com/opinion/jamie-sarkonak-non-citizen-johns-shouldnt-get-sentence-discounts-for-their-crimes?utm_source=twitter&utm_medium=organic&utm_campaign=NP_social&utm_content=comment.

97 *R v Kovac*, 2024 QCCQ 1152 [*Kovac*].

98 *Kovac* at paras 66-74.

99 *Kovac* at para 74. This decision is very similar to *R v Singh*, 2021 ABPC 103.

In a way, the above cases illustrate a pattern of lower court behaviour that appears to treat and apply collateral immigration consequences almost as if they are outright mitigating factors. As the SCC makes clear in *Pham*, "collateral consequences are not aggravating or mitigating factors;" they are the consequences that result from "the impact of the sentence on the particular offender" and "may be taken into account in sentencing as the personal circumstances of the offender."[100]

B. Implications from Case Law Regarding the Structural Tension Between IRPA and Sentencing Principles

It should be noted that, although the previously analyzed cases are but a select microcosm of the total amount of cases where collateral immigration consequences were considered at the trial level since *Pham*, the fact that they appear in courts across Canada can be viewed as indicative of a possible pattern. As well, not every legal decision is recorded with many rulings being delivered orally from the bench. It is also conceivable that the misapplication of *Pham* has created problematic precedents in cases that have not been appealed, due to the nature of *stare decisis*. Collateral immigration consequences in sentencing are likely to continue to grow in relevancy, with immigration rates steadily increasing in the last five years. Therefore, it is also likely that the issues related to the application of collateral immigration consequences that are highlighted in this paper will as well continue to be prevalent. Baglay succinctly observes this growing trend:

> The changing importance of collateral immigration consequences in sentencing is evident in the results of a case law search. A Quicklaw boolean search ("sentenc! /p immigration /p consequence") found only five decisions for the time period between April 1, 1978 and July 10, 1995, and nine decisions for the time period between July 10, 1995 and June 28, 2002, where collateral immigration consequences were considered in sentencing.

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100 *Pham* at para 11.

> In contrast, the same boolean search from June 28, 2002, to March 13, 2013 turned up over one hundred decisions, and the period from March 13, 2013 to March 1, 2019 resulted in over three hundred.[101]

If the above is true, one may further expect a continuation of the tension between the sentencing process and immigration policies, based on the case law analyzed thus far. The case law discussed then gives us a glimpse of what to expect going forward. Clearly, these cases demonstrate how sentencing judges sometimes reshape otherwise fit sentences to avoid triggering removal or the loss of appeal rights, when confronted with the harshness of IRPA's mandatory consequences. These decisions reveal not only an inconsistent application of *Pham*, but a deeper judicial struggle to reconcile two legal regimes that operate on fundamentally different premises. *Pham* has perhaps brought to the forefront these underlying issues through the introduction of collateral immigration consequences at sentencing, even though the decision in *Pham* itself is not entirely to blame for this. However, it appears that lower courts struggle more with these dynamics when compared to appellate courts.

Taken together, these cases reveal a consistent pattern, perhaps more so at the lower court level. Some sentencing judges attempt to soften those consequences by adjusting criminal sentences downward, when confronted with the harshness or inflexibility of IRPA's administrative consequences. This judicial impulse is understandable, particularly in cases involving long-term residents or individuals with strong ties to Canada. Evidently, IRPA's administrative logic is not designed to be harmonized with the moral logic of sentencing. A distortion of the proportionality principle and a diminished emphasis on moral blameworthiness occurs when judges attempt to reconcile the two.

101 Baglay 2019 at pp 20-21.

C. Collateral Immigration Consequences: Nuance and Skepticism

In all cases, a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender."[102] A flexible sentencing regime cannot be permitted to impose "artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will."[103] The particular significance of collateral immigration consequences are dependant on the facts and situation of a case.[104]

In some cases, collateral immigration consequences will play a much more prominent role than in others. Collateral immigration consequences should not be applied with unwarranted significance in every single case as the facts of that case may not necessitate it. Nuance in the application specific to the facts at hand is needed. For instance, the risks of deportation and losing admissibility to Canada arguably vary in significance as per the individual situation of a non-citizen offender. It is clear that collateral immigration consequences will play an important factor in a sentence, in the case of a permanent resident who has grown up their entire life in Canada.

Alternatively, collateral immigration consequences incurred by a criminal conviction will be less severe in the case of either a foreign national or a permanent resident who has not lived their entire life in Canada and still retains significant ties to their home nations. As the Ontario Court of Appeal (ONCA) recognized in *R v Quick*, "some of these [collateral immigration] consequences may be too remote" or "too insignificant" to be legally relevant.[105] Collateral immigration consequences need not be significantly

102 *Pham* at paras 13-15.

103 *Pham* at paras 13-15.

104 *Pham* at paras 13-15.

105 *R v Quick*, 2016 ONCA 95 at para 31.

emphasized in every case despite being *prima facie* applicable. It is determining the extent of their applicability that must be analyzed closely. Perhaps the "best approach to collateral consequences begins with the recognition that not all collateral consequences are the same."[106]

Considering what exact state benefit or public interest is being pursued by allowing such a foreign national or permanent resident to remain in Canada by lowering their sentence due to collateral immigration consequences is a deeper, more theoretical, consideration for the judiciary. The ability to deport a non-citizen is but a basic competency of all sovereign nations and it is arguably not unduly harsh for the citizenry to expect the judiciary to facilitate such a function where applicable. [107] Collateral immigration consequences are but a natural consequence of a sovereign state's right to create separate legal distinctions between different classes of citizens and non-citizens, despite the tendency of collateral immigration consequences to result in extra punishment in addition to the criminal sanction received by an offender.[108]

Trial judges consider collateral immigration consequences, and adjust a sentence accordingly, based on the prospective negative immigration-related consequences that a particular sentence may incur for that specific offender. However, removal orders often are not even enforced, even when a criminal conviction does trigger a deportation order for a non-citizen offender. For instance, Faulino Deng, a Sudanese national who has been convicted of aggravated assault, sexual assault, and cocaine trafficking in Ontario, still

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106 E. Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72:2 *University of Toronto Faculty of Law Review* at p 74.

107 Such as imposing fit and proportionate sentences which may invariably lead to a deportation order.

108 See generally B. Berger, "Sentencing and the Salience of Pain and Hope" (2015) 11:4 *Osgoode Legal Studies*.

remains in Canada, despite being issued a deportation order in 2007.[109] Similar examples appear to be startingly frequent.[110]

Thus, an increasing "number of foreign citizens remain in Canada despite having been ordered out on public safety and security grounds."[111] The number of foreign citizens who have been issued removal orders has ultimately increased from just 291 in 2021, to 1,200 in 2018.[112] Essentially then, sentences are adjusted in accordance with possible collateral immigration consequences that may not ever come to fruition in the first place.[113] The inability to functionally carry out a deportation order may in part be due to ongoing bureaucratic issues within the immigration system itself, of which is a discussion admittedly beyond the scope of this paper.

Furthermore, there is still a significant chance that a non-citizen will be able to remain in Canada, if they retain their right to appeal a removal order following a criminal conviction.[114] For instance, Baglay explains that 6,000 admissibility decision appeals ended in removal orders being stayed and

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109 S. Bell & A. Russell, "Canada is Failing to Deport Criminals. Here's Why it can take Years, Sometimes Decades" *Global News* (21 March 2018) https://globalnews.ca/news/4087292/canada-deporting-dangerous-criminals-ineffective-still-here/ [Bell & Russell].

110 See especially J. Sarkonak, "Foreign Criminals Keep Getting their Deportations Cancelled" *National Post* (26 November 2025) https://nationalpost.com/opinion/jamie-sarkonak-committing-a-crime-should-guarantee-deportation.

111 Bell & Russell.

112 Bell & Russell.

113 See generally C. Singer, "Most of those Sent Deportation Letters Still Living in Canada Year Later" (15 February 2024) https://immigration.ca/most-of-those-sent-deportation-letters-still-living-in-canada-years-later/.

114 See J. Sarkonak, "Canada's Criminal Sentencing Discounts for Non-Citizens are Unfair" *National Post* (6 May 2024) https://nationalpost.com/opinion/jamie-sarkonak-canadas-criminal-sentencing-discounts-for-foreigners-are-unfair [Sarkonak 2024].

3,000 were appealed, of the 13,000 admissibility decision appeals held between 2002 and 2017.[115] A sizeable portion of appellants thus appear to be successful.

As such, the IAD can still grant special relief and thus stay or quash that removal order, even if a foreign national or permanent resident loses the right to appeal a deportation order.[116] These special reliefs are usually granted on the basis of either humanitarian or compassionate grounds.[117] In other situations, public pressure and media outrage can also be harnessed to pursue a stay of a removal order. Various migrant organizations rallied to show support and put public pressure on the CBSA to not enforce the removal order of Charles Mwangi, a Kenyan national who was issued a deportation order.[118] In the end, he was granted a one-year temporary residency.[119]

The point here is to draw attention to the observation that the idea of collateral immigration consequences is being used for sentence reductions, while the actual collateral immigration consequences that could occur appear do not frequently materialize. In many cases deportations are not carried out for years, if ever. Ultimately, you may have, theoretically, a non-citizen criminal who gets a reduction in sentencing for collateral immigration consequences that may not even occur. A combination of either public pressure or the various levels of special appeal and judicial review that are

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115 S. Baglay, "In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences" (2018) 41:4 *Manitoba Law Journal* at pp 187-198 [Baglay 2018].

116 Baglay 2018 at p 190.

117 Baglay 2018 at p 190; See also Navaneelan at p 31.

118 J. Omstead & R. Lim, "Canada Halts Planned Deportation of Man to Kenya" *Toronto Star* (25 August 2024) https://thestar.com/ news/ontario/a-victory-canada-halts-planned-deportation-of-bisexual-man-to-kenya/article_39a81aa7-6de7-51ce-b793-465a933cb71e.html [Olmstead & Lim].

119 Olmstead & Lim.

available under the IRPA, or even bureaucratic inefficiency, would ensure this outcome.[120]

D. Competing Perspectives on *Pham*, Immigration Policy, and the Sentencing Process

Like any nuanced topic, there are a multitude of different interpretations and perspectives. It is commonly perceived that *Pham* actually promotes individualized sentencing through recognizing that non-citizens face disproportionate hardships compared to citizens convicted of the same offence, by allowing judges to consider collateral immigration consequences.[121] Scholars adopting this view argue that ignoring such consequences would itself violate proportionality, as the same sentence may carry dramatically different real-world impacts depending on the offender's immigration status.[122] On this account, adjusting a sentence to avoid triggering deportation is not an artificial distortion but a necessary correction to ensure fairness. Of course, the very logic in *Pham* itself is a part of this line of thought.

Immigration consequences becoming the dominant factor in the proportionality analysis is an issue, despite individualization in crafting sentences being essential. Many trial courts have reduced sentences not because of mitigating circumstances intrinsic to the offender's moral culpability, but because of the mechanical thresholds in the IRPA, as the case law analyzed above has shown. This shifts the focus from the offender's blameworthiness to the administrative structure of immigration law. The result arguably is not individualized justice but a parallel sentencing regime for non-citizens. This is the outcome that *Pham* explicitly warned against.[123]

120 See especially Singer.

121 Baglay 2019 at pp 5, 33.

122 Gerami & Ranger at pp 12-13.

123 *Pham* at paras 14-16.

A similar contention holds that preventing the deportation of long-term residents, individuals with strong community ties, or those with compelling humanitarian circumstances, aligns with broader societal values.[124] From this perspective, adjusting sentences to preserve access to IAD appeals or to avoid the IRPA thresholds may prevent outcomes that are socially and morally undesirable.[125] Doubtlessly, humanitarian-based concerns are compelling, but they are best addressed within the immigration system itself, such as through the IAD's discretionary humanitarian and compassionate jurisdiction.[126] Allowing sentencing courts to pre-emptively adjust sentences to preserve access to that process effectively collapses two distinct legal regimes into one. This not only undermines Parliament's intent in structuring IRPA consequences but also risks distorting criminal sentencing principles. The appropriate venue for weighing humanitarian factors is the immigration appeal process, not the sentencing hearing. Maintaining this separation preserves the integrity of both systems.

Another critique suggests that the intersection of criminal and immigration law may diminish in significance as Canadian immigration policy evolves. For example, changes to admissibility rules, humanitarian pathways, or prosecutorial discretion could reduce the number of non-citizens facing removal for criminality. If so, the doctrinal tension identified in this paper may be temporary or overstated.

The structural tension between IRPA's rigid, status-based inadmissibility regime and the *Criminal Code*'s individualized proportionality framework remains, even if immigration policy shifts in the future. The IRPA thresholds continue to exert a powerful gravitational pull-on sentencing decision, as

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124 *IRPA* at ss 3(f)-(h).

125 See generally *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

126 Baglay 2019 at p 190.

evidenced by recent jurisprudence. In addition, Canada's non-citizen population continues to grow and remain steady, thus increasing, rather than diminishing, the likelihood of criminal-immigration law intersections.[127]

Most importantly, the normative question at the heart of this paper transcends policy fluctuations: to what extent should collateral immigration consequences influence the determination of a fit sentence? The risk of artificial sentencing outcomes persists regardless of demographic or policy trends. Sentencing is a core expression of the criminal justice system's legitimacy. The public interest is impacted when sentences are distorted to avoid collateral immigration consequences.

Consequently, existing scholarship has tended to focus on fairness and equity issues for non-citizens during the sentencing and deportation processes, but less attention has been paid to how Pham destabilizes proportionality. The structural incompatibility between IRPA's legislative logic and sentencing principles is a novel and understudied area requiring further scholarly analysis. Accordingly, this paper has sought to fill this analytical gap within the literature on this subject.

Overall, as the SCC in *Pham* reiterated, the focus of sentencing "must be on the fundamental principle of proportionality…a sentence must be proportionate, having regard to the gravity of the offence and the degree of responsibility of the offender, and only then may collateral consequences be taken into account."[128] Collateral immigration consequences cannot be used to justify the imposition of an artificial sentence that is not proportionate to the particular offence and the moral blameworthiness of the specific

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127 J. Finlayson and S. Globerman, "Average Annual Immigration was 617,800 from 2000 to 2015 Compared to 1.4 million from 2016 to 2024" *Fraser Institute* (8 July 2025) https://fraserinstitute.org/studies/canadas-changing-immigration-patterns-2000-2024.

128 *Pham* at paras 13-15.

offender.[129] The artificial diminishment of the moral blameworthiness of the offender occurs as a result of the over-emphasis of the importance of collateral immigration consequences or conceiving of them and their possible negative implication for an offender in a broad and general sense (when these negative implications may not even materialize). This leads to sentences that are arguably disproportionate to the gravity of the offence.

IV. The Retributivist Theory of Punishment as a Theoretical Remedy and Other Possible Solutions

As this paper previously mentioned, collateral immigration consequences play a much more important role at sentencing when a permanent resident is convicted of an offence whose typical punishment is in and around the six-month range, or when a foreign national is facing the imposition of a criminal record. A possible remedy here would be to amend the IRPA so that both foreign nationals and permanent residents can appeal deportation orders regardless of the type of punishment that they receive.[130] In a way, this would keep trial judges focused on crafting a sentence that is truly fit and proportional without having to consider whether that sentence should be lowered so that a non-citizen offender will not face deportation without a right of appeal. However, this approach may face limitations in that it could exert excess bureaucratic stress on the immigration system's appeal division if every non-citizen offender facing deportation could appeal such an order. It may also appear to the public as if the state is granting 'special treatment' to non-citizens and giving them too much leniency for their criminal actions.

Alternatively, a more extreme solution would be to amend the *Criminal Code* and exclude collateral immigration consequences from sentencing

129 *Yare* at para 23.

130 See Forrest.

decisions entirely.[131] However, the *Charter* rights of non-citizens may be impeded if this were done.[132] The overturning of the precedent set in *Pham* would also likely receive extensive criticism from the legal community and render a lot of post-*Pham* jurisprudence void. As such, a solution to these issues lays somewhere in the middle. The principles set out in *Pham* have become embedded within the relevant jurisprudence and arguably deserve a place in a liberal and democratic Canada. However, as this paper has contended, collateral immigration consequences in some cases have been poorly applied, overemphasized, and have led to sentences that are not proportionate to the gravity of the offence. Thus, any solution must be capable of addressing these particular problems.

Consequently, a return to a more retributivist theoretical perspective on sentencing, when collateral immigration consequences are a factor, is needed. The retributivist theory of justice posits that an offender must be "punished in proportion to the severity of their crime."[133] As per the concept of just deserts, the requisite punishment must be proportionate to the gravity of the crime committed and should not be artificially lowered.[134] The retributivist theory also contends that both "equality of punishment and proportionality are necessary conditions for a fair sentencing system."[135] In Canada, the public generally perceives routinely imposed sentences as far too lenient. In

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131 Forrest.

132 Forrest.

133 Legal Information Institute, "Retributivism," *Cornell Law School*https://law.cornell.edu/wex/retributivism.

134 A. McKee, "Just Deserts," https://docmckee.com/cj/docs-criminal-justice-glossary/just-deserts-definition/; See generally S. Cohen, "An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment" (1981) 27:1 *McGill Law Journal*.

135 See generally S.D. Krup, "Retributive Justice Model of Sentencing" (1981) 45:4 *Federal Probation*.

an opinion poll published by the Government of Canada, around 79% of Canadians share these sentiments.[136]

Figure 3: Canadians' Perceptions of the Harshness of the Justice System

	Too Lenient	About Right	Too Strict
Sentencing	79%	14%	2%
Enforcement	69	25	3
Laws	65	29	3

Moreover, the criminal justice system should exercise caution to avoid giving the impression to the public that similar offences, when committed by a citizen and a non-citizen, lead to disproportionate outcomes. For instance, Sarkonak suggests that the misuse of collateral immigration consequences in sentencing can lead to the public perception that "non-citizens have additional padding when they commit crimes in comparison to Canadians."[137] Whether correct or not, public perception of the criminal justice system matters, and the public must have confidence that it operates efficiently and produces fair and just outcomes.

With these factors in mind, this analysis has largely examined cases where the requisite sentence was arguably disproportionate to the gravity of the offence because of an over-emphasis on collateral immigration consequences. Retributivist theory would contend here that this is a mitigation of offender moral blameworthiness, and such a sentence is not adequate. [138]

136 Department of Justice Canada, "Public Perception of Crime and Justice in Canada: A Review of Opinion Polls" (17 August 2022), https://justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr01_1/p0.html.

137 Sarkonak 2024.

138 Stanford Encyclopedia of Philosophy, "Retributive Justice" (18 June 2014) https://plato.standford.edu /entries/justice-retributive/ [Stanford]. See generally W. Hurlburt, "Why Do We Punish? The Case for Retributive Justice and the Justification of Punishment" (1979) 17:2 *Alberta Law Review* [Hurlburt].

Contrastingly, retributivist theory also decries sentences that disproportionate when they punish an offender too severely beyond what they morally deserve for the offence that they committed.[139] Consequently, in particular situations, retributivist theory and attention to collateral immigration consequences can be complementary in sentencing decisions.

Most would likely agree that a sentence which leads to the deportation of an offender who committed an offence that is either trivial or where the offender's moral culpability is severely diminished, would be a disproportionate punishment. Likewise, a sentence that leads to deportation where the offender faces certain death in their nation of origin would also be grossly disproportionate. While these are extreme cases, retributivist theory and collateral immigration consequences would align in situations where a sentence leading to deportation would be disproportionate.[140] However, a more challenging situation arises when a non-citizen offender commits a heinous crime whose requisite punishment must invariably lead to a sentence that will trigger deportation, and that offender faces possible death in their nation of origin. In that case, the courts could not artificially lower such a sentence, and the offender would have to appeal to the humanitarian safeguards within the IRPA.

Retributivism generates the balancing solution here because it provides a principled limit to how far collateral immigration consequences influence sentencing: they may be considered only insofar as they bear on the offender's moral culpability, not as independent policy objectives. Retributivism does not demand that sentencing judges ignore the lived realities of offenders. Rather, it requires that all mitigating or aggravating factors be assessed through the lens of moral culpability. Collateral immigration consequences may therefore be considered only to the extent that they illuminate the

139 Stanford; Hurlburt.

140 Stanford; Hurlburt.

offender's degree of responsibility or the personal circumstances that bear on their blameworthiness. What retributivism rejects is the use of immigration consequences as an independent policy objective (such as preserving appeal rights or avoiding deportation thresholds) when these consequences do not meaningfully relate to the offender's culpability for the underlying offence.

This distinction is crucial. Under a retributivist framework, the IRPA thresholds are not a morally relevant factor in itself. It is an administrative trigger created by Parliament for immigration purposes, not a reflection of the offender's moral desert. Retributivism therefore provides a principled basis for preventing the IRPA's structural thresholds from distorting the proportionality analysis required under section 718 of the *Criminal Code*. In this way, retributivism does not conflict with *Pham*; rather, it operationalizes *Pham*'s insistence that collateral consequences remain "but one relevant factor" and that proportionality must still prevail.[141]

Outside of these extreme theoretical cases, judges should remember that the mere act of deportation is a logical result tied to the legal distinction of non-citizen status created by Parliament. To create sentences that cite these factors in justification of a lower sentence where it is unwarranted is to essentially dilute the significance of this legal distinction. Parliament has created different legal classes of residency and the implications of this should not be artificially mitigated in but extreme circumstances.

A. Incorporating a Retributivist Approach

Accordingly, the next question to ask is how exactly such a retributivist-informed perception of collateral immigration consequences can be brought into practice.

Sentencing guidelines related to collateral immigration consequences that are informed by retributivist perceptions which do not permit such consequences to be over-emphasized or lead to sentencing outcomes that are

141 *Pham* at paras 18-20.

grossly disproportionate to the gravity of the offence, could be used here as a possible solution. A retributivist framework incorporated into sentencing guidelines could either come from the SCC or by Parliament in a legislative amendment to the *Criminal Code*.

Regarding the former, this would likely require the SCC to revisit collateral immigration consequences in a new case to give updated jurisprudential guidance, however, the timeframe on when this would occur is admittedly uncertain. Regarding the latter, Parliament would have to have the political will to make such an amendment which could only happen if there was public pressure to do so or if such a change was amenable to the political views of the pertinent legislators. Regardless, making these changes would allow for a retributivist-informed application of *Pham* principles while improving the public's perception of how non-citizens are sentenced.[142]

However, it should be noted that such changes in terms of applying collateral immigration consequences in accordance with a more retributivist-informed framework may bump up against trial judge discretion. As the SCC stated in *Pham*, "a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender."[143] As *R v Lacasse* [*Lacasse*] affirms, trial judges are granted by Parliament a broad discretion to create appropriate sentences under section 718.3(1) of the *Criminal Code*.[144] In a

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142 See generally M. Altman, *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State*, 1st ed (London: Routledge, 2021); See also C. Cowley, *Moral Responsibility*, 1st ed (London: Routledge, 2014).

143 *Pham* at paras 13-15; See also *R v Lacasse*, 2015 SCC 64 at para 53 [*Lacasse*].

144 A. Puchta, "Let's Talk About Lacasse, Part 2: The Implications of Lacasse for the Sentencing Process" (15 January 2017) https://canliiconnects.org/en/commentaries/44540.

way, this 'wide latitude" afforded to sentencing judges may 'bump up against' any legislative intrusions that limit this discretion.[145]

On this note, some commentators may argue that sentencing judges are well-positioned to balance the competing demands of proportionality and compassion. According to this view, *Pham* simply affirms the flexibility inherent in sentencing and trusts judges to avoid excessive departures from fit sentences.[146] While judicial discretion is essential to sentencing, the case law demonstrates that discretion alone has not produced consistent or principled outcomes. The structural tension between IRPA and the *Criminal Code* creates predictable pressure points that cannot be resolved through case-by-case discretion alone. This supports the need for either a refined doctrinal framework or legislative clarification.

Finally, even if this retributivist-informed framework faces too many difficulties in coming to fruition, Crown attorneys should remain cognizant of these dynamics and be ready to initiate a leave of appeal in situations akin to *Yare* where the final sentence at the trial level has placed "undue weight on collateral immigration consequences and failed to impose a sentence that was proportionate to the gravity of the offences and the moral culpability of the offender." [147] Of course, appellate-level litigation cannot always be counted on due to a lack of resources and time. Regardless, further guidance related to the application of the *Pham* principles, along with better oversight of the types of sentences that such an application creates, is ultimately needed to ensure that the requisite sentence remains proportional to the gravity of the offence committed.

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145 *Lacasse* at paras 11-12.

146 Baglay 2019 at p 5.

147 *Yare* at para 13.

Hypothetically, it is worth examining what a retributivist-informed framework, in the form of new sentencing guidelines, would look like. The following four-step structure is proposed.

The starting point would be to determine the proportionate sentence without reference to immigration status. This initial step anchors the proportionality analysis in the offender's moral blameworthiness, the gravity of the offence, and parity with comparable cases. It prevents the IRPA's administrative thresholds from becoming the de facto starting point.

The second step would be to determine whether any immigration-related hardship is relevant. Hardship is morally relevant only when it bears on the offender's culpability or personal circumstances in a manner analogous to other recognized collateral consequences (employment issues or family disruption). For example, a precarious immigration status that contributed to the offender's vulnerability or reduced autonomy may be relevant here. However, in contrast, the mere fact that a sentence of six months in custody will eliminate the right to appeal a removal order for a permanent resident is not morally relevant, as it does not speak to the offender's responsibility for the offence.

At the third step, a sentence should only be adjusted when the hardship meaningfully affects moral blameworthiness. This step ensures that any downward sentence adjustment remains attached to just deserts, not to the avoidance of IRPA consequences. It prevents the imposition of 'artificial sentences,' such as those criticized in *Yare*, where the sentence was reduced solely to preserve appeal rights.[148]

Lastly, judges should articulate why the immigration consequence is or is not morally relevant, how the adjustment preserves proportionality, and why the sentence does not circumvent Parliament's immigration objectives. This

148 *Yare* at para 9.

transparency in decision-making enhances both jurisprudence and public confidence.

As mentioned above, it is important to reiterate here that these guidelines would not require legislative amendment. they could be adopted judicially as a principled method for applying *Pham* in a manner consistent with section 718 of the *Criminal Code*.

B. Addressing Public Perceptions and the Normativity of a Retributivist Solution

A retributivist framework also responds to concerns about public confidence in the administration of justice. A common objection that has already been noted is that limiting the weight of collateral immigration consequences may lead to harsh outcomes for non-citizens. However, retributivism protects against undue harshness by still allowing for the consideration of collateral immigration consequences, but only when they impact the moral blameworthiness of the offender. Relief is still available under the IRPA.

Alternatively, the opposite common concern here is that the public may perceive lenient sentences in serious cases as illegitimate, particularly where immigration consequences appear to drive the outcome. A retributivist approach directly addresses this concern by ensuring that serious offences receive sentences that are commensurate with their gravity, regardless of immigration status. Thereby, the IRPA thresholds are prevented from influencing the sentencing process.

Through the proposed guidelines, a retributivist approach provides a principled framework for determining when collateral immigration consequences are relevant and how much weight they should carry. Rather than outright rejecting *Pham,* the retributivist approach refines it by ensuring that collateral consequences do not overshadow the fundamental principle of proportionality.

By clarifying the framework of retributivism and offering substantive guidelines for judicial application, this approach provides a coherent method for reconciling sentencing principles with the IRPA's legislative objectives. It prevents the IRPA's administrative thresholds from distorting the sentencing process while preserving space for individualized consideration where immigration consequences genuinely bear on moral blameworthiness. In doing so, it strengthens both the integrity of sentencing and public confidence in its outcomes.

V. Conclusion

As is evident, there are many intersections between criminal law and immigration law. Since the SCC decision in *Pham* and the introduction of collateral immigration consequences in sentencing, these intersections have only increased. Subsequently, this paper has explored the extent to which the incorporation of collateral immigration consequences in sentencing decisions mitigates offender moral blameworthiness.

Overall, it has been contested that the inclusion of collateral immigration consequences in sentencing tends to lead to disparate results that often diminish offender moral blameworthiness. This paper began with a background analysis pertaining to the interconnected features of the criminal law and immigration law systems, particularly in relation to how criminal convictions can trigger additional implications under the IRPA for non-citizens. Typically, a foreign national will receive a deportation order by the immigration authorities after receiving a criminal conviction.[149] Foreign nationals in such a situation will also not be given a right to appeal such a deportation order.[150] In the case of a permanent resident, they will be issued a deportation order along with the loss of the right to appeal such an order

149 As enumerated in section 36(1) of the *IRPA*. See *IRPA* at s 36(1).

150 *IRPA* at s 36(1).

if they are convicted of a criminal offence whose sentence is more than six months incarceration.[151] As such, criminal convictions can have serious implications on a non-citizen's admissibility to Canada.

Subsequently, this paper then critiqued how collateral immigration consequences have been applied in relevant situations. Through various case analyses of *Yare*, *Lopez-Orellana*, *Lee*, *J.S.*, *Singh*, *Khant*, and *Kovac*, this paper highlighted how collateral immigration consequences can be applied in a manner where they lead to a disproportionate sentence that mitigates offender moral blameworthiness. These cases arguably demonstrated how the over-emphasis on collateral immigration consequences have led to sentences that are not proportionate to the gravity of the offence committed.

Essentially, these dynamics occur when a trial judge uses their discretion to over-emphasize the potential impact that a criminal conviction will have on a non-citizen offender's immigration status in Canada. The trial judge then uses the spectre of these potential collateral immigration consequences to justify the imposition of a sentence that is lower than what that offender would normally receive if these collateral consequences where not relevant. Often, this is done so that the offender avoids these consequences after sentencing. In other cases, this is done so that the offender retains their ability to mitigate these consequences after sentencing. For example, a non-citizen offender facing likely deportation may be given a lesser sentence so that they retain their ability to appeal a deportation order. The cases analyzed also identify how collateral immigration consequences have exacerbated a tension between the distinct legal regimes of sentencing and immigration law. IRPA's mandatory consequences operate independently of moral culpability, which is precisely why adjusting sentences to avoid them risks distorting proportionality.

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151 As enumerated in section 36(2) of the *IRPA*. See *IRPA* at s 36(2).

In other situations, this paper highlighted how collateral immigration consequences may not even materialize. This occurs when deportation orders are either not carried out due to bureaucratic inefficiency, or when they are stayed. The staying of deportation orders may occur due to either public pressure, or if the non-citizen applicant successfully appeals. Even if a deportation order cannot be appealed, it still may be stayed on humanitarian or compassionate grounds. In some cases, this may be worrisome as, essentially, sentences are crafted and lowered in relation to collateral consequences that may not ever actually materialize.

While the sampled cases analyzed in this paper are clearly not representative of all situations where collateral immigration consequences have been applied, they could be indicative of a larger trend as they were taken from courts across Canada. Given that cases involving collateral immigration consequences have steadily increased in recent years, it is logical to infer that the propensity of cases where collateral immigration consequences may be abused could increase.[152] These occurrences may necessitate a re-evaluation of how *Pham* is being applied across Canadian courts as trial judges cannot artificially lower sentences. Sentences must be proportionate to the gravity of the offence at hand.

In light of these issues, this paper argued for a return to a more retributivist approach to sentencing as a potential solution. The proposed four-step retributivist-informed framework, implemented through new sentencing guidelines, would curtail the weight accorded to collateral immigration consequences.

Regardless of the approach, this paper has contested that legal reform in this area is required. Countering the over-emphasis of collateral immigration consequences in sentencing decisions will ensure that sentences in such situations can be brought back in line with section 718 of the *Criminal*

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152 See page 14 of this paper.

Code.[153] Fundamentally, collateral immigration consequences should not be used to artificially lower a sentence from what is typically a fit and proportionate sentence in such a situation. This diminishes offender moral blameworthiness and leads to results that arguably are out of line with fundamental sentencing principles and public expectations.

While the principles from *Pham* do deserve a place in the relevant jurisprudence, perhaps they should be limited to more exceptional circumstances. The failure to mitigate against these problems may lead to a "de facto new range of sentences for non-citizens."[154] Overall, in most situations, the requisite sentence must match the gravity of the offence. Due to Canada's increasing immigration demographics, it is likely that the criminal courts will have to grapple with collateral immigration consequences more frequently. Thus, coherent legislative changes or new judicial guidelines are needed so that these problems do not persist, lest they begin to attract the indignation of the public to a greater extent.

153 *Criminal Code* at s 718.

154 Baglay 2019 at p 7.