

**My client is a 38-year-old citizen of the Philippines who has been a permanent resident of Canada for six years. She works as a licensed practical nurse at a long-term care facility in Manitoba. About eight months ago she was convicted of theft under \$5,000 after she took approximately \$400 from a resident's room at the facility. She pleaded guilty, received a conditional discharge, and successfully completed her probation conditions. She genuinely believed at the time that a conditional discharge would protect her immigration status and her lawyer did not advise her otherwise. She is now engaged to a Canadian citizen and they want to start a family. She is terrified about what this means for her permanent residence and her ability to eventually apply for citizenship. She has no other criminal history of any kind. The theft was completely out of character and arose during a period of severe financial hardship following her husband's sudden death, which left her solely responsible for supporting her three children, two of whom are still minors living with her in Canada. I need to understand her current inadmissibility risk, whether the conditional discharge actually protects her the way her previous lawyer thought it would, what her options are if she is found inadmissible, and whether and when she can realistically apply for citizenship given all of this. Please provide relevant cases and legislation.**

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## **Overview**

Your client's conditional discharge is legally effective to prevent IRPA s. 36 inadmissibility because *Criminal Code* s. 730(3) deems her not convicted, and the s. 22(2) *Citizenship Act* bar likewise does not apply; however, s. 21 of the *Citizenship Act* excludes the probation period from her physical presence calculation, delaying (but not preventing) her citizenship application, and her humanitarian and compassionate profile under the Ribic factors is exceptionally strong in the unlikely event any removal order were ever issued.

### **The Conditional Discharge and Inadmissibility Under IRPA s. 36**

The central question is whether your client's conditional discharge for theft under \$5,000 triggers inadmissibility under the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). The answer, under the current state of the law, is that it should not. Section 36 IRPA renders a permanent resident inadmissible only upon "conviction" of a qualifying offence. Section 730(3) of the *Criminal Code*, RSC 1985, c C-46 provides expressly that where a court directs a discharge, "the offender shall be deemed not to have been convicted of the offence." The Ontario Court of Appeal confirmed this principle directly in *R v Lu*, [2013 ONCA 324](#) at para 15: "Since a discharge is not a conviction, the rule would not apply if she were given a conditional discharge rather than a suspended sentence." This position has been confirmed repeatedly, including by very recent decisions: *R v Kaur*, [2026 ABCJ 41](#) at para 42 confirms that a conditional discharge "is deemed not to be a 'conviction' within the meaning of s. 36 of the [IRPA]." Since theft under \$5,000 (a hybrid offence) could only trigger inadmissibility as a "conviction" — either under s.

36(1)(a) for a sentence exceeding six months, or under s. 36(2)(a) as a deemed indictable offence per s. 36(3)(a) — and since no conviction was entered, neither ground of inadmissibility applies. Your client's previous lawyer's advice that a conditional discharge would protect her immigration status was therefore legally correct in its conclusion, even if the reasons were not fully articulated. Critically, however, because she has now successfully completed her probation conditions, the discharge is effectively final. Section 730(4) of the *Criminal Code* permits revocation of a discharge only where the offender is convicted of a further offence during the probation period; that risk has now passed.

### **The s. 44 Process and Absence of Ministerial Discretion**

Despite the foregoing, your client's file is not entirely risk-free at the administrative level. If a CBSA officer were to become aware of the underlying facts and prepare an inadmissibility report under s. 44(1) IRPA, it is important to understand that officers have no discretion to consider personal circumstances when making admissibility findings. As the Federal Court of Appeal held in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 35 (“*Cha*”), immigration officers and Minister's delegates “are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach.” However, because the precondition for inadmissibility is a “conviction,” and no conviction was entered, an officer who correctly applies the law should not prepare a report. Should an inadmissibility report nonetheless be prepared in error, it should be challenged immediately on the basis that the s. 36 inadmissibility ground has not been met. If the matter were to proceed to the Immigration Division and a removal order issued, your client as a permanent resident has a right of appeal to the Immigration Appeal Division (“IAD”) under s. 63(3) IRPA. The s. 64(2) bar to IAD appeals applies only where the crime “was punished in Canada by a term of imprisonment of at least six months” — since no imprisonment was imposed and no conviction was entered, s. 64 has no application here.

### **If Inadmissibility Were Found: The Ribic Factors and IAD Relief**

In the unlikely event that a removal order were issued, your client's humanitarian and compassionate profile is exceptionally strong under the framework established in *Ribic v Canada*, [1985] IABD No 4, as confirmed by the Supreme Court of Canada in *Chieu v Canada*, 2002 SCC 3, and applied consistently by the Federal Court. The Ribic factors — confirmed in *Iamkhong v Canada (Citizenship and Immigration)*, 2011 FC 355 at para 7, and *Canada (Minister of Citizenship and Immigration) v Bryan*, 2006 FC 146 at para 46 — include: (1) seriousness of the offence; (2) possibility of rehabilitation; (3) length of time in Canada and degree of establishment; (4) family in Canada and impact of removal; (5) community support; and (6) hardship if removed. These factors are illustrative and not exhaustive, and the IAD's

discretion under ss. 67(1)(c) and 68(1) IRPA is broad: the IAD must be "satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case." Applied to your client: her offence involved a single theft of \$400, entirely out of character, committed during a period of acute financial crisis following the sudden death of her spouse; she has no prior criminal record; she completed her probation without incident; she has been a permanent resident for six years and is a licensed practical nurse; she has two minor children in Canada; she is engaged to a Canadian citizen; and the hardship of removal to the Philippines would be severe and disruptive to her children. In *Li v Canada (Citizenship and Immigration)*, 2009 FC 992 at para 18, the Federal Court confirmed that the best interests of children analysis must engage with the full parent-child relationship, not merely financial contributions, and at para 17 confirmed that general deterrence has "no place in the process of immigration deportation." The IAD, on any honest application of the Ribic framework, would be expected to grant relief or a stay.

### **Citizenship: Timing and the Effect of the Discharge**

Your client's path to citizenship is affected in two important respects by the conditional discharge, both of which are manageable. First, the conditional discharge does not constitute a "conviction" for purposes of s. 22(2) of the *Citizenship Act*, RSC 1985, c C-29, which bars citizenship only where the person "has been convicted of... an indictable offence under... any other Act of Parliament" within the four-year period before the application. Since *Criminal Code* s. 730(3) deems her not to have been convicted, s. 22(2) does not apply. She is not prohibited from applying. Second, and more practically significant, s. 21 of the *Citizenship Act* provides that "no period may be counted as a period of physical presence for the purpose of this Act during which a person, under any enactment in force in Canada, (a) has been under a probation order." This provision applies regardless of whether the underlying order is a discharge or a conviction — the probation order itself triggers the exclusion. Accordingly, the period during which your client was subject to probation conditions (approximately eight months) cannot count toward the 1,095-day physical presence requirement under s. 5(1)(c)(i). This effectively extends her earliest eligible citizenship application date by that corresponding period. She should calculate her earliest application date by adding the probation period to what would otherwise have been her eligibility date. Assuming she has maintained continuous physical presence in Canada throughout her six years of permanent residence and has no unfulfilled conditions on her PR status, she should be eligible to apply within the next year or two. The s. 22(1)(a)(i) temporary bar on citizenship while under a probation order has now expired upon completion of probation, and crucially, s. 5(1)(f) — which bars citizenship while "under a removal order" — has no application so long as no removal order is issued.

## The Uninformed Plea Issue and Available Remedies

One further issue deserves attention. Your client's previous lawyer did not advise her of the interaction between her conditional discharge and the *Citizenship Act's* physical presence exclusion under s. 21 — a consequence that, while not catastrophic, delays her citizenship path. The Supreme Court of Canada held in *R v Wong*, [2018 SCC 25](#) at para 4 (“*Wong*”) that “for a plea to be informed, an accused must be aware of the criminal consequences of the plea as well as the legally relevant collateral consequences” bearing on “sufficiently serious legal interests.” Immigration consequences — including loss of permanent resident status and the right of appeal — constitute legally relevant collateral consequences: *Wong* at para 72. The majority in *Wong* requires that an accused seeking to vacate a plea file an affidavit establishing a subjective reasonable possibility that she would have pleaded differently or insisted on different conditions (*Wong* at para 6). However, in your client's case, the plea itself achieved the most protective available outcome — a conditional discharge — and the discharge did protect her from inadmissibility as intended. The practical benefit of revisiting the plea is therefore limited. The more productive focus is forward-looking: ensuring no admissibility report is triggered, calculating the precise citizenship application window accounting for the s. 21 exclusion, and documenting the strong H&C profile for any contingency.