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This fourth issue of the International Newsletter contains a collection of six articles related to international human rights law issues.



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Holland & Knight LLP

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Although the promulgation of the United Nations Declaration on the Rights of Indigenous Peoples was a landmark development, there is a curious gap in

the declaration: a definition of "indigenous people" is nowhere to be found. While the UN indicates that, rather than define indigenous peoples, it prefers to identify indigenous groups via a list of factors, the application of those factors is not always consistent. In fact, the articulation and application of the factors shows that the prevailing international framework for indigenous rights relies on an othering and objectifying approach to "the Indigenous."

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By Sergio R. Karas
B.A., J.D.

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Immigration: Minor Criminality Is a Big Headache for Business in Canada

BY SERGIO R. KARAS, B.A., J.D.

Introduction

Traveling to Canada on business has become trickier over the past few years. Under the *Immigration and Refugee Protection Act ("IRPA")*,¹ which came into force in 2002, a "foreign national" applicant with a criminal record, even a minor one, can be denied entry to Canada.² Under the *IRPA*, and in particular section 36(2), it is difficult for an applicant with a conviction to enter Canada. This presents a challenge to employers and employees alike.

Criminality Under the IRPA:

Immigration legislation divides criminal offenses committed abroad into two major classes:

- section 36(1)(b) deals with convictions outside of Canada where the equivalent offence in Canada could be punishable with a sentence of imprisonment of at least ten (10) years. That is considered to be "serious criminality."
- section 36(2) applies to individuals who are convicted outside of Canada of an indictable offence, or two summary offences, regardless of the penalty. That is considered to be "criminality."

A foreign national can be deemed "inadmissible" and can be refused entry into Canada if he or she has been convicted outside of Canada:



- * of an offense punishable by way of indictment; or
- * of a "hybrid offense", one which could be prosecuted either summarily or by indictment.³

An indictable offense is one which is generally more serious and carries a longer sentence; and is more or less similar to a felony in the United States. Summary offenses are generally less serious, carry shorter sentences or smaller fines and are somewhat similar to misdemeanors in the United States. Hybrid offenses are those that can be prosecuted either by indictment or by summary conviction depending on the nature and

circumstances of the offense. Driving under the influence of alcohol ("D.U.I.") is one example of such offense. Pursuant to section 36(3)(a) of the *IRPA* a hybrid offense is considered to be an indictable offense for immigration purposes, even if it has been prosecuted summarily.⁴

Canadian Equivalency of the Offense

Immigration officers determine the inadmissibility of an applicant convicted of an offense in a foreign country by equating the offense with its Canadian equivalent.⁵ What must be considered as the governing principle is what the status

of the offense would be if committed in Canada. A lenient or harsh treatment of the offense in a foreign country is irrelevant for the purposes of equivalency, while the nature of the offense and penalty range under Canadian law governs the determination of its equivalence.

How to Overcome Inadmissibility

1. Temporary Resident Permits ("TRPs"):

An applicant who may be barred from entering Canada for a past conviction has a number of options to overcome inadmissibility. One option is to apply for a TRP either at the border or at a Canadian visa post in his host country. Generally speaking, the former is dependent on the CBSA officer's discretion and the latter takes a considerable amount of time to process. The legislative authority for granting TRPs is found in section 24(1) of the *IRPA*:

24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

It must be noted that, in order to qualify for consideration for a TRP, the entry to Canada by the applicant has to be justified in the circumstances. This has generally been construed by the courts as "exceptional circumstances."⁶

2. Criminal Rehabilitation:

Where more than five years have passed since the completion of the applicant's sentence, payment of fine and conclusion of any probation, the applicant can

apply for "criminal rehabilitation." Rehabilitation removes inadmissibility and is recommended if the applicant seeks to enter Canada whether for business or pleasure. The decision to grant rehabilitation is dependent on a variety of factors. The documentation necessary for an application is extensive and processing is lengthy.

Criminal rehabilitation applies to those persons who have committed offenses considered to be either serious criminality or have more than one conviction, even if they are for summary offenses or misdemeanors. Applications must be filed at the appropriate Canadian visa post abroad accompanied by court records, police certificates, letters of support, and exhaustive submissions documenting the purpose of the entry. Criminal rehabilitation is not possible if the sentence has not been completed.⁷

3. Deemed Rehabilitated:

Another way to overcome inadmissibility is if more than ten years have passed since the completion of an applicant's sentence where the offense can be considered indictable or hybrid in Canada, or five years when the offense is punishable by summary conviction. In such circumstances, rehabilitation does not happen automatically but the applicant may be "deemed rehabilitated" by immigration officials at a port of entry.⁸

Port of Entry Checks and Applicant's Duty to Disclose

Canada Border Services Agency ("CBSA") officers have authority to permit or deny entry into Canada.⁹ Canadian border officers have access to computerized information of criminal records of U.S. citizens intending to enter Canada.¹⁰ It is therefore advisable to disclose any prior offenses or charges when applying for a Canadian visa or entry to Canada at a border, regardless of whether an applicant

was actually convicted or not.

Conclusion

Thousands of foreign nationals have been turned away from the border since the *IRPA* came into force. This has become a serious problem for individuals who have minor convictions dating back several years. Businesses that have customers or operations in Canada and who want their employees to travel to Canada will find the practical effects of this provision frustrating, if their employees have ever been convicted of any offense. It is therefore advisable to obtain the necessary documentation and appropriate legal advice to overcome "inadmissibility" before seeking to enter Canada.



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Endnotes

- 1 S.C. 2001 c. 27, as amended.
- 2 "[T]he IRPA marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security." Supreme Court of Canada in *Medovarski v. Canada*, (Minister of Citizenship and Immigration), 2005 SCC 51 (S.C.R. June 7, 2005).
- 3 IRPA s. 36(2), *supra*.
- 4 *Cha v. Canada* (Minister of Citizenship and Immigration), 2006 FCA 126, [2006] F.C.J. No. 491 (QL).
- 5 *Wang v. Canada*, 2007 FC 1188, held that a visa officer is under an obligation to conduct an equivalency analysis to show that the act "if committed in Canada, would constitute an indictable offence under an Act of Parliament", as set out in paragraph 36(2)(c) of the IRPA before deeming a person "criminally inadmissible".
- 6 *Nasso v. Canada*, 2008 FC 1003.
- 7 *Rafat v. Canada*, 2010 FC 702.
- 8 IRPA s. 36(3)(c).
- 9 Immigration law is based on the fundamental principle that non-citizens do not have an unqualified right to enter or remain in Canada. *Chiarelli v. Canada* (Minister of Employment and Immigration), [1992] 1 S.C.R. 711,733.
- 10 'Americans say Canadian border is tightening for those with minor criminal past', By Les Perreux, The Canadian Press Online, Feb. 17, 2008.

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