

Collateral Consequence: Entry into Canada with Criminal Convictions

BY BILL LEMONS

IN THE WAKE of the *Padilla* decision, the criminal justice system has reason to be concerned about collateral consequences related to immigration.¹

A judge or prosecutor is likely, sooner or later, to be faced with a defendant claiming that a conviction will prevent the person from traveling to Canada. The United States border with Canada is the largest international border in the world. Officially known as the “International Boundary,” it is 5,525 miles long and touches 13 states, three oceans, and the Great Lakes. Seventy million travelers cross the border every year, including 35 million vehicles.

Historically, travel between the United States and Canada has been relatively easy. The International Boundary is enforced by civilian law enforcement: Canadian Border Services Agency and U.S. Customs & Border Protection. The International Boundary is often referred to as the largest open border in the world. However, security on both sides of the border has tightened since the terrorist attacks on September 11, 2001.

United States citizens and permanent residents of the United States are exempt from the requirement of a visa to enter Canada for up to 180 days.² As recommended by the 9/11 Commission, legislation was enacted requiring passports, enhanced drivers’ licenses, military orders, or other acceptable documentation to cross the International Boundary beginning June 1, 2009.³ Consequently, more people are becoming aware of the difficulties entering Canada with criminal convictions.

INADMISSIBILITY BASED UPON CRIMINALITY

In 2001, the Canadian Parliament passed the *Immigration and Refugee Protection Act* (IRPA).⁴ Under IRPA § 3(1)(i), one objective of the statute is “to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.” The United States and Canadian governments recently released the *United States-Canada Joint Border Threat and Risk Assessment*.⁵ In addition to the threat of terrorism, the assessment provides an overview of the criminal threat along the International Boundary. It includes drug, firearm, tobacco, and bulk currency smuggling; intellectual property crimes; and human trafficking.

In 2007, the Supreme Court in Canada held that IRPA §§ 33, 77-85 was unconstitutional.⁶ The decision involved inadmissibility into Canada based upon security grounds. It did not involve inadmissibility based upon criminality grounds and the statute was amended in 2009 to address the constitutionality problems.

IRPA § 36 provides criminality grounds for inadmissibility into Canada. IRPA § 36(1) provides inadmissibility of permanent residents and foreign nationals for “serious criminality” and § 36(2) provides inadmissibility of foreign nationals for criminality. The statute covers offenses committed in Canada and those committed outside of Canada.

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It provides:

(2) A foreign national is inadmissible on grounds of criminality for:

- (a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;
- (b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
- (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or
- (d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

A foreign national is defined under IRPA § 2(2) as “a person who is not a Canadian citizen or permanent resident, and includes a stateless person.” Under IRPA § 21(1), a foreign national becomes a permanent resident through approval of their application by an immigration officer.

To ascertain the immigration consequences of a conviction, the prosecutor can check the *Canadian Criminal Code* to determine whether it is an indictable offense and compare the elements of the crime with the crime they are prosecuting.⁷ For example, a review of Canada’s impaired driving statute shows that it would qualify as an indictable offense in Canada. The Canadian impaired driving law provides:

- (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
 - (a) while the person’s ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
 - (b) having consumed alcohol in such a quantity that the concentration in the person’s blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.⁸

In Canada, impaired driving is an offense that may be prosecuted either by indictment or summarily.⁹ Under

IRPA § 36(3)(a), “an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily.” Consequently, a foreign national convicted of DWI is deemed inadmissible into Canada, whether convicted in Canada or convicted in the United States provided the conviction is equivalent with Canadian law.

Under IRPA § 36(3)(b), inadmissibility cannot be based upon a crime if the defendant is acquitted. For offenses committed outside of Canada, however, the person may still be deemed inadmissible if they are not convicted.¹⁰ Under IRPA § 36(2)(c), a foreign national is inadmissible for committing an act that constitutes an indictable crime in Canada.

Generally, impaired driving would not constitute “serious criminality” under IRPA § 36(1), making it applicable to permanent residents of Canada. IRPA § 36(1) requires a maximum term of imprisonment of ten years. In Canada, the maximum sentence for impaired driving is five years.¹¹ However, impaired driving causing bodily harm or death of another person would constitute serious criminality.¹² Consequently, permanent residents of Canada would be deemed inadmissible under the IRPA for those crimes.

OVERCOMING INADMISSIBILITY

A foreign national deemed inadmissible due to criminality may still be able to enter Canada. There are three possibilities: rehabilitation status, temporary resident permit, or pardon.

Rehabilitation status permanently waives the inadmissibility.¹³ The foreign national needs to apply for rehabilitation status and pay a \$200 application fee.¹⁴ The foreign national is eligible for rehabilitation status after five years following completion of their sentence, including probation. For purposes of impaired driving, it is important to note that the driver’s license suspension or revocation period can impact the calculation of the five-year period. Consider the following scenario addressed by Citizenship and Immigration Canada:

On June 3, 2003, I was convicted of driving under the influence and had my driver’s license taken away from me for three years. When am I eligible to apply for rehabilitation?

The sentence imposed ends on June 3, 2006. Count five years from the end date of the suspension or the date your driver’s license is reinstated. You would therefore be eligible to apply for rehabilitation on June 3, 2011.¹⁵

Offenders with one DWI conviction may be eligible for deemed rehabilitation status. For deemed rehabilitation status, the foreign national does not need to submit an application. Foreign nationals with only one criminal conviction creating the inadmissibility can be deemed rehabilitated ten

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years following completion of their sentence and probation.

Foreign nationals not eligible for rehabilitation status can still enter Canada by obtaining a temporary resident permit.¹⁶ The foreign national must apply for the temporary resident permit.¹⁷ If granted, the foreign national is issued a temporary resident visa with their passport that temporarily waives the inadmissibility. The temporary resident visa restricts the length of time that the foreign national may be in Canada and may impose other restrictions. The application fees for a temporary resident visa are \$75 for a single entry, \$150 for a multiple entry visa, or \$400 for a family.

Under IRPA § 36(3)(b), a third way that a foreign national can enter Canada is to receive a pardon. Foreign nationals deemed inadmissible for a crime committed in Canada can apply for a pardon with the Parole Board of Canada. The *Criminal Records Act* allows the Parole Board of Canada to grant, deny, or revoke pardons for convictions under federal acts or regulations of Canada.¹⁸

CONCLUSION

Determining the immigration consequences of a criminal conviction can be a complex legal question. There is not a bright line rule about what crimes trigger immigration consequences and these consequences may be unavoidable through plea bargaining. In addition, the defendant has options available to overcome the inadmissibility that involve some discretion by the Canadian government. While an impaired driving conviction may deem someone inadmissible to travel into Canada, the offender does have

options available to overcome the inadmissibility. These options are relatively simple and basically require completion of an application form and payment of a small fee. In addition, any attempt to “mask” criminal convictions would be contrary to efforts of both governments to work together to improve border security.

For more information about this subject, visit the Citizenship and Immigration Canada Web site.¹⁹

¹ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

² Citizenship and Immigration Canada, *Countries and territories whose citizens require visas in order to enter Canada as visitors*, <http://www.cic.gc.ca/english/visit/visas.asp> (Date Modified: July 11, 2011).

³ *Intelligence Reform and Terrorism Prevention Act of 2004*, Pub.L. 108-458, Title VII, § 7209, Dec. 17 2004, 118 Stat. 3823.

⁴ *Immigration and Refugee Protection Act*, S.C. 2001, c 27, available at <http://laws.justice.gc.ca/PDF/I-2.5.pdf>.

⁵ United States-Canada Joint Border Threat and Risk Assessment (July 2010), available at http://www.publicsafety.gc.ca/prg/le/oc/_fl/jbtra-eng.pdf.

⁶ *Charkaoui v. Canada* (Minister of Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.), available at <http://scc.lexum.org/en/2007/2007scc9/2007scc9.html>.

⁷ Criminal Code, R.S.C., 1985 c. C-46 (Can.), available at <http://laws.justice.gc.ca/PDF/C-46.pdf>.

⁸ Criminal Code, R.S.C., 1985 c. C-46, § 253.

⁹ Criminal Code, R.S.C., 1985 c. C-46, § 255(1).

¹⁰ Citizenship and Immigration Canada, *Rehabilitation For Persons Who Are Inadmissible to Canada Because of Past Criminal Activity*, p.4 (2011), available at <http://www.cic.gc.ca/english/pdf/kits/guides/5312E.PDF>.

¹¹ Criminal Code, R.S.C., 1985 c C-46 § 255(1)(a).

¹² Criminal Code, R.S.C., 1985 c C-46 § 255(2) – (3.2).

¹³ “the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;” IRPA, § 36(3)(c).

¹⁴ Citizenship and Immigration Canada, *Rehabilitation for persons who are inadmissible to Canada because of past criminal activity*, available at <http://www.cic.gc.ca/english/information/applications/rehabil.asp> (Date Modified: July 29, 2010).

¹⁵ Citizenship and Immigration Canada, *Rehabilitation For Persons Who Are Inadmissible to Canada Because of Past Criminal Activity*, p.7 (2011), available at <http://www.cic.gc.ca/english/pdf/kits/guides/5312E.PDF>.

¹⁶ “A foreign national who, in the opinion of the officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if the 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.” IRPA, § 22(1).

¹⁷ Citizenship and Immigration Canada, *Temporary Resident Visa Application Form*, available at <http://www.cic.gc.ca/english/information/applications/visa.asp> (Date Modified: June 7, 2011).

¹⁸ *Criminal Records Act*, R.S.C., 1985, c. C-47 (Can.), available at <http://laws.justice.gc.ca/PDF/C-47.pdf>.

¹⁹ Citizenship and Immigration Canada, <http://www.cic.gc.ca/english/index.asp> (Date Modified: July 5, 2011).