CRIMINAL INADMISSIBILITY UNDER CANADIAN IMMIGRATION LAW

One of the requirements to come to Canada as a foreign national is to be admissible to Canada. This is the case for a foreign national who is simply seeking entry to Canada as a tourist or business visitor as it is for a foreign national who is applying for a Canadian work permit, study permit, or applying for Canadian permanent residence. The grounds for inadmissibility to Canada by which foreign nationals are assessed are set out in Sections 34 to 42 of Canada's *Immigration and Refugee Protection Act* (*IRPA*). Among the grounds of inadmissibility, the most frequently encountered tend to be criminality and serious criminality, misrepresentation, health reasons, failure to comply with any of the requirements of the Act such as staying longer than authorized and having an inadmissible family member.

Criminalty and Serious Criminality as Grounds of Inadmissibility to Canada

A foreign national who has been convicted of a criminal offence in Canada or abroad or who has committed an act abroad that is tantamount to a crime in Canada is inadmissible to Canada. Section 36 of the *IRPA* establishes serious criminality and criminality as grounds of inadmissibility. Serious criminality pertains to having been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years or for which a term of imprisonment of more than six months has been imposed, or having been convicted outside Canada of an offence that in Canada would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. "Regular" criminality refers to having been convicted in Canada of an indictable offence or of two offences that do not arise from a single occurrence, or having been convicted outside of Canada of an offence that would constitute an indictable offence in Canada or two offences that would constitute offences under an Act of Parliament. Both Canadian permanent residents and foreign nationals can be inadmissible for serious criminality – as permanent residents can be subject to removal proceedings for serious criminality – but only foreign nationals can be inadmissible for "regular" criminality.

Indictable offences are offences in the Canadian *Criminal Code* that are more serious and have a more severe penalty whereas summary conviction offences are more minor offences. Many offences in the Canadian *Criminal Code* can be prosecuted either by way of summary conviction or by indictment and are referred to as "hybrid" offences. For the purposes of Canadian immigration law, all hybrid offences are deemed to be indictable offences which make an individual inadmissible to Canada as set out in Paragraph 36(3)(a) of the *IRPA*.

Assessing Equivalency of Foreign Offence

In order to determine whether a foreign national convicted of an offence abroad is inadmissible to Canada it is necessary to perform a criminal equivalency analysis. The criminal equivalency analysis is based on comparing the essential elements of the foreign law pursuant to which a foreign national is convicted and

the essential elements of the similar Canadian offence to determine whether the essential elements of the foreign and Canadian offences are similar enough for them to be considered equivalent offences. The essential elements of an offence often involves considering the *actus reus, mens rea* and defences for the foreign and Canadian offences. This analysis is performed by the Immigration Officer or Canada Border Services Agency Officer when determining whether or not an individual is inadmissible to Canada. When an Officer finds criminal equivalency between the essential elements of the foreign offence and a Canadian offence under an Act of Parliament and it equates to serious criminality or criminality, a foreign national is considered to be inadmissible to Canada.

When assessing whether a client may be inadmissible to Canada or not, it is important for Counsel to proced with a criminal equivalency analysis. Criminal equivalency can be assessed by comparing the precise wording in the foreign statute with the Canadian statute. If the language used in the offences are similar enough, equivalency may be found whereas if the language used is quite distinct, the offences are less likely to be found equivalent. In addition, criminal equivalency can be assessed by examining the facts surrounding the conviction to determine whether sufficient evidence exists to substantiate the essential elements required for the Canadian offence. The standard of proof is whether there are "reasonable grounds to believe" that an individual has been convicted outside of Canada of an equivalent offence to an offence under an Act of Parliament, and is thus inadmissible to Canada.

Inadmissibility for Driving Under the Influence of Alcohol

One of the most common sources of criminal inadmissibility to Canada is Driving Under the Influence of Alcohol (DUI). In the United States, convictions for DUIs are not always considered to be a serious criminal matter depending on the state. However, in Canada even one DUI conviction is considered to be a criminal matter that renders a foreign national inadmissible to Canada. The key question is whether the foreign DUI conviction can be considered equivalent to a Canadian conviction pursuant to Sections 253 to 255 of the Canadian *Criminal Code* which establishes the hybrid Canadian offence of "Operating While Impaired". As a hybrid offence, "Operating While Impaired" is considered to be an indictable offence for the inadmissibility analysis. If a foreign DUI conviction is deemed by an Officer to be equivalent to "Operating While Impaired", the foreign national would be found to be inadmissible to Canada. If a foreign DUI conviction is instead deemed to be equivalent to a pure summary conviction offence under the Canadian Criminal Code or an infraction under a Canadian provincial highway code, then the foreign national would not be found to be inadmissible to Canada. In order to perform the criminal equivalency analysis for a foreign DUI conviction, it is important to obtain a copy of the relevant foreign statute as well as all arrest and court records.

When a Conviction is "Not a Conviction" and Does Not Trigger Inadmissibility

At times, a foreign national may not be inadmissible to Canada despite having been charged with an offence that would be equivalent to an indictable offence in

Canada depending on the court disposition of their case. A conviction is a finding by a competent authority such as a competent foreign court that an individual is guilty of an offence. Where a conviction was set aside on appeal, an absolute or conditional discharge was granted that is found to be equivalent to an absolute or conditional discharge in Canada or the individual was granted a foreign pardon that is found to be equivalent to a Canadian record suspension, no conviction exists. In contrast, a conviction exists while an appeal of the conviction is ongoing, upon delivery of a suspended suspension and where an individual is found to be guilty *in absentia*.

Certain criminal dispositions in the United States are considered to be equivalent to an absolute or conditional discharge in Canada or a record suspension in Canada such that they do not render foreign nationals inadmissible as set out in Citizenship and Immigration Canada's Enforcement Manual Chapter ENF2/Overseas Policy Manual Chapter OP18 "Evaluating Inadmissibility". In general, an "expungement" in a U.S. state does not equate to a conviction as the charges are considered to be obliterated or struck out. An "acquittal contemplating dismissal" and a "deferral of conviction" in a U.S. state are considered to be equivalent to a conditional discharge in Canada and thus do not result in a conviction. A "deferral of prosecution" and "*nolo prosequi*" in a U.S. state are considered to be equivalent to a stay of charges in Canada thus do not result in a conviction. Similarly, a "deferral of judgment" in the U.S. does not constitute a conviction in Canada. When counseling clients at the stage when they are undergoing criminal proceedings regarding their prospects for admissibility to Canada, it is important to address the U.S. dispositions that will not constitute convictions in Canada.

Options to Address Criminal Inadmissibility

An individual is exempted from inadmissibility for criminality or serious criminality where he or she has been "rehabilitated" pursuant to paragraph 36(3)(c) of the *IRPA* which removes the grounds of inadmissibility. There are two kinds of rehabilitation – Deemed rehabilitation and rehabilitation upon application. Deemed rehabilitation occurs for indictable offences committed outside Canada once ten years have elapsed since the day of completion of the sentence whereas for summary conviction offences, the period is five years. While deemed rehabilitation does not require submission of an application, it is advisable that the individual have thorough documentation in hand at the Canadian port of entry to prove the requisite time has elapsed since completion of the sentence. For rehabilitation upon application, at least five years must have elapsed since the completion of the sentence in order for an individual to be eligible to apply. The minimum five-year period is calculated from the time the last part of the sentence imposed is completed, whether it is a fine, imprisonment, parole, probation period or driver's license suspension. In order to be granted rehabilitation, the foreign national must demonstrate that he or she is leading a stable lifestyle and is unlikely to commit another criminal offence. Rehabilitation packages can be submitted to the appropriate Canadian visa office or can be presented in person at selected Canadian ports of entry by the individual together with the processing fee, application form,

original police certificates from all countries and U.S. states lived in since the age of 18 for six months or more, copies of all documents pertaining to the charges, court documents, documents pertaining to the sentence and reference letters or other documents pertaining to good character. Once rehabilitation is accorded upon application, an Approval of Rehabilitation letter is issued to the individual to confirm that he or she is no longer inadmissible to Canada for the past conviction.

Where a foreign national is not yet eligible for rehabilitation or may be waiting processing of a rehabilitation application at a visa office he or she may apply for a Temporary Resident Permit if he or she has a justifiable reason to travel to Canada and can demonstrate that he or she is unlikely to commit another criminal offence. A Temporary Resident Permit temporarily overcomes criminal inadmissibility for the period for which it is issued and can be issued in conjunction with status documents such as a work permit or study permit. An individual can apply for a Temporary Resident Permit to the applicable Canadian visa office or can choose to present the application in person at a Canadian port of entry together with the processing fee, original police certificates, copies of all documents pertaining to the charges, court documents, documents pertaining to the sentence, reference letters or other documents pertaining to good character and documents justifying the need to enter Canadian temporarily.

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When counseling a client regarding potential criminal inadmissibility issues, it is important to request all documents and court records pertaining to charges, arrest, conviction and sentencing. This permits assessing the nature of the offence and whether the disposition may amount to a conviction in Canada pursuant to an Act of Parliament to render the individual inadmissible. The greatest opportunities for avoiding potential criminal inadmissibility often exist where an individual is still in the process of negotiating a plea bargain, as some dispositions do not equate to a conviction in Canada. Often, Canadian immigration counsel is consulted only in the aftermath of a conviction at which point it becomes necessary to consider potential eligibility for deemed rehabilitation or rehabilitation upon application. Where a foreign national appears to be criminally inadmissible upon analysis, is not eligible for rehabilitation and yet needs to come to Canada, it may be worth applying for a Temporary Resident Permit. Whether submitting an application for rehabilitation or a Temporary Resident Permit, or both, it is important to advise the individual early on, of the need to apply for original police certificates for every country and every state, in the case of the United States, where they have lived for at least six months consecutively since the age of 18 as they take time to obtain. Where the rehabilitation or Temporary Resident Permit may be applied for at the Canadian port of entry, it is best to coach the individual prior to their arrival to respond to questions pertaining to the past conviction(s) and their subsequent lifestyle changes.

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