TAB 7

Overcoming Criminal Inadmissibility: Criminal Rehabilitation

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19th Annual Immigration Law Summit – Day One

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

Overcoming Criminal Inadmissibility: Criminal Rehabilitation

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INTRODUCTION:

The *Immigration and Refugee Protection Act* (the "IRPA") and the *Immigration and Refugee Protection Regulations* (the "IRPR") set out the legislation and the policy objectives that govern the admission of permanent and temporary residents to Canada. This legislation outlines Canada's policy objectives, one of which is the commitment to the protection of the health and safety of Canadians in addition to maintaining the security of Canadian society and the promotion of international justice and security by fostering respect for human rights.

This policy objective is achieved by denying access to Canadian territory to persons who are criminals, serious criminals or security risks.[1] Therefore, foreign nationals and Permanent Residents who are described under section 36 of the IRPA are criminally inadmissible to Canada. However, the legislation allows the Minister or delegated authority (i.e. Minister's Delegate) to grant "*rehabilitation*", which removes the grounds of inadmissibility, in meritorious cases, when the Minister is satisfied that the person concerned meets certain criteria, has been rehabilitated and is highly unlikely to become involved in any further criminal activities. The application of the criminal rehabilitation provisions are at the *discretion of the Minister* and do not constitute a right for persons who are criminally inadmissible to be accepted under them.

It is important to note that:

- section 36(1) of the IRPA – Serious Criminality - applies to a foreign national *or* a permanent resident of Canada;
- in comparison, section 36(2) of the IRPA – Criminality - *only* applies to foreign nationals.

There are two types of Rehabilitation:

1) Deemed Rehabilitation; and
2) Rehabilitation.

A person that falls under subsections 36(1) (b) or (c) or 36(2)(b) or (c) of the IRPA may be "deemed rehabilitated" if he/she fulfils the requirements of this class. However, if a

[1] *Immigration and Refugee Protection Act* [IRPA], section 3(1)(h) and (i), and section 36.

person does *not* meet the eligibility criteria for "deemed rehabilitation", he/she may be eligible to apply for "rehabilitation".

It is important to note that only individuals who are described in subsections 36(1)(b) or (c) and 36(2)(b) or (c) of the IRPA may request rehabilitation in order to overcome their inadmissibility to Canada.[2] Any person convicted *in Canada* must apply for and be granted a Pardon form the Parole Board of Canada[3] in order to overcome their inadmissibility. Further, a foreign national is not criminally inadmissible to Canada for having one summary offence.

APPLICABLE LAW & DEFINITIONS[4]:

Section 17 of the IRPR advises that rehabilitation can be applied for after the five year period has elapsed, specifically, the provision states:

> **17.** For the purposes of paragraph 36(3)(*c*) of the Act, the prescribed period is five years
>
> (*a*) ***after the completion of an imposed sentence***, in the case of matters referred to in paragraphs 36(1)(*b*) and (2)(*b*) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*; and
>
> (*b*) ***after committing an offence***, in the case of matters referred to in paragraphs 36(1)(*c*) and (2)(*c*) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.
> [emphasis added]

Section 18 of the IRPR defines "**deemed rehabilitated**" as follows:

> (1) For the purposes of paragraph 36(3)(c) of the Act, the class of persons deemed to have been rehabilitated is a prescribed class.
> (2) The following persons are members of the class of persons deemed to have been rehabilitated:
> (a) persons who have been convicted outside Canada of no more than one offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, if all of the following conditions apply, namely,
> (i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,
> (ii) at least 10 years have elapsed since the day after the completion of the imposed sentence,

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[2] Principally found in the *Immigration and Refugee Protection Regulations* [IRPR], Part 3, sections 17 and 18. e: http://www.npb-cnlc.gc.ca/pardons/servic_e.htm).

[3] For those individuals who fall under subsection 36(1)(a) or 36(2)(a), the Parole Board of Canada has the authority to grant and issue pardons to these foreign nationals. For details please see: http://www.pbc-clcc.gc.ca/

[4] For additional definitions that are pertinent to this topic, please see the Immigration Manual entitled "*ENF 14 / OP 19 Criminal Rehabilitation*", at section 6.

(iii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,

(iv) the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(v) the person has not within the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(vi) the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and

(vii) the person has not committed an act described in paragraph 36(2)(c) of the Act;

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, if all of the following conditions apply, namely,

(i) at least five years have elapsed since the day after the completion of the imposed sentences,

(ii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,

(iii) the person has not within the last five years been convicted in Canada of an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(iv) the person has not within the last five years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(v) the person has not before the last five years been convicted in Canada of more than one summary conviction offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(vi) the person has not been convicted of an offence referred to in paragraph 36(2)(b) of the Act that, if committed in Canada, would constitute an indictable offence, and

(vii) the person has not committed an act described in paragraph 36(2)(c) of the Act; and

(c) persons who have committed no more than one 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, if all of the following conditions apply, namely,

(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,
(ii) at least 10 years have elapsed since the day after the commission of the offence,
(iii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,
(iv) the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,
(v) the person has not within the last 10 years been convicted outside of Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,
(vi) the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and
(vii) the person has not been convicted outside of Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

The IRPA does not define what constitutes "**rehabilitation**", however the 2008 version of the immigration manual entitled "*ENF 14/OP 19 Criminal Rehabilitation*" defines the term as follows:

> Black's Law Dictionary defines rehabilitation as
> *The process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes.*
>
> Within the immigration context, the Federal Court of Appeal has described the rehabilitation decision as an assessment of possible future comportment based on actions, attitudes and behaviour since conviction.

DEEMED REHABILITATION:

Generally, rehabilitation is demonstrated by the passage of time with no recurrence of criminal activity, and through an examination of the person's activities and lifestyle, both before and after the offence, in order to consider whether the person is indeed "*rehabilitated*". Therefore, a foreign national who plans on making a request for deemed rehabilitation should be able to provide the officer with the appropriate evidence to demonstrate that he/she meets the criteria set out in section 18 of the IRPR.

A request for deemed rehabilitation may be made at the port of entry (only for foreign nationals who are from non-visa required countries) or may be made directly to a visa

office along with an application for a temporary or permanent resident visa, or for a study or work permit. There is no fee for a "deemed rehabilitation" request and no application that needs to be completed.

It is important to note that we have noticed a trend at the border/port of entry recently; more and more border officers are inclined *not* to make these types of determinations and often will ask individual's to submit their request to the nearest Canadian Consulate, Embassy or High Commission.

The reasoning for this is that more often than not, individuals do not have the proper documentation or information for the border officer to render a decision. Further, applying at a post outside of Canada allows the officer to take the time necessary to verify the content of the information and documentation submitted.

The deemed rehabilitation provisions outlined in section 18 of the IRPR are applicable as follows:

> Foreign nationals who have been convicted of a single indictable offence or who have committed a single indictable offence outside of Canada are likely to be deemed rehabilitated under the following conditions:
> - Ten years have passed since the completion of the imposed sentence or 10 years has elapsed since the commission of the offence; **and**
> - The offence for which they committed would be punishable in Canada by a maximum term of imprisonment of less than 10 years; **and**
> - They have not been convicted of or committed, any additional offences at the time of their examination.
>
> Foreign nationals who have been convicted of two or more summary offences, not arising out of a single occurrence, outside of Canada are likely to be deemed rehabilitated if:
> - five years has elapsed since the sentences were served or were to be served; **and**
> - they have not been convicted of any other offences at the time of their examination.

It is important to note that in a situation where a person was deemed rehabilitated and then committed a subsequent offence, the subsequent offence voids/annuls the deemed rehabilitation which may have applied to the earlier offence. The outcome of this situation is that the foreign national would have to submit an application for rehabilitation.

If an officer has determined that a foreign national qualifies for deemed rehabilitation to overcome inadmissibility, the officer may issue a Visitor Record[5] and/or will enter the information into the GCMS in order to assist with future examinations.

If the officer is not satisfied that the foreign national is eligible for deemed rehabilitation on the basis of the available information or evidence, or the officer determines that the foreign national does not meet the criteria for deemed rehabilitation, the officer may recommend a Temporary Resident Permit (in order to temporarily overcome the inadmissibility) or if the person is already in Canada, the officer may prepare a report under section 44 of the IRPA.

REHABILITATION:

If a foreign national does not qualify for deemed rehabilitation, he/she should complete and submit an Application for Criminal Rehabilitation (IMM 1444) for individual rehabilitation to a visa office abroad or to CPC-Vegreville. It is imperative that the application is properly completed and all supporting documentation is submitted for consideration, so as to ensure timely processing. Presently, processing these types of applications is taking approximately two (2) years.

It is important to note that decisions on these types of files are rendered by the Minister (or the Minister's delegate) at Citizenship and Immigration Canada (CIC) National Headquarters (NHQ) and are not made by officers at the visa post, at CIC or at the port of entry.

The Federal Court of Appeal, in *Leung* v. *Canada* (*MCI*) [2000], F.C.J. No. 576, clearly supported a lower court finding that,

> Rehabilitation involves an **assessment as to future comportment based on actions, attitudes and comportment since conviction**. It is worthy of note that the responsibility for **rehabilitation decisions has been vested in the Minister**, not in officials such as visa officers. It was for the Minister to determine whether or not she was satisfied and the fact that the visa officer who prepared the submission to her was himself satisfied is of no consequence. [emphasis added]

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[5] Citizens from certain countries (i.e. USA, UK, etc.) do not require a Temporary Resident Visa to enter Canada as a Visitor. Foreign Nationals from non-Visa required countries normally get a stamp in their passport upon entry to Canada, which typically allows them to enter and remain in Canada for up to 6 months at any one time. However, if the immigration officer has a reason to impose restrictions on the period of stay authorised, or if there are other valid reasons, a Visitor Record may be issued. A Visitor Record can be issued to all visitors, whether he/she has a previously issued visa or not. Foreign Nationals are allowed to stay for the duration of the Visitor Record's validity. Should a foreign national wish to extend her/his stay, he/she may submit an application to do so (an Application to Change Conditions, Extend My Stay, or Remain in Canada - IMM 1249, please see: http://www.cic.gc.ca).

In order to determine the ground of inadmissibility, the foreign offence must be equated with a Canadian federal statute.[6] There are three tests for determining equivalency under the *Immigration and Refugee Protection Act*, as set out by the Federal Court of Appeal in *Hill* v. *Canada* (*Minister of Employment and Immigration*) [1987], F.C.J. No. 47, at page 6, which are as follows,

1) A comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining there from the essential ingredients of the respective offences; or
2) An examination of the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not the evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; or
3) A combination of one and two.[7]

It is crucial to note that the equivalent statute must be an Act of Parliament (no municipal or provincial statutes) and that the pertinent time frame for equivalency is **the date the application is received by CIC officials** and not the date of the conviction. In other words, the effect of this *policy decision* means that the equivalent section of the Canadian federal statute in effect on the day the application was received by CIC will form the basis of the rehabilitation application. The author would like to emphasise that this is a policy decision only and as there is no definitive case law on the matter, an argument to the contrary could be made.

Example:

Jane Doe was out one evening in March 2004 after work celebrating her large raise (from her very generous boss) and she had a few too many glasses of wine. After the evening had come to a halt, Jane decided to drive home, since she thought she was o.k to drive. Jane, who was swerving all over the road in her car, was stopped by one of New York's finest (a police officer) and she was charged under article 31, section 1192.2 "*Operating a motor vehicle while under the influence of alcohol or drugs*" of the *Vehicle and Traffic Act* in the state of New York. On 03 June 2004, she pled guilty and was sentenced to probation for 2 years along with a $500 fine.

According to *Hill*, the immigration officer may apply any one of the three tests which are: (a) examine the precise wording of each statute to determine if they are equivalent; or (b) consider the essential elements of the offence to determine if they are equivalent; or (c) a combination of (a) and (b).

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[6] *Ibid,* at section 13. Please also see the Immigration Manual entitled "*ENF 2 / OP 18 Evaluating Inadmissibility*" found at www.cic.gc.ca.
[7] *Hill* v. *Canada* (*MEI*) [1987], F.C.J. No. 47, at page 6. [*Hill*]

A comparison of the wording of the two sections of legislation is as follows:

NEW YORK STATE	CANADA
1192. **Operating a motor vehicle** while **under the influence of alcohol** or drugs. [...] 2. Driving while intoxicated; per se. No person shall operate a motor vehicle while such **person has .08 of one per centum or more by weight of alcohol in the person's blood** as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article. [...] 3. Driving while intoxicated. **No person shall operate a motor vehicle while in an intoxicated condition.**	s. 253 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.
1193. **Sanctions**. 1. Criminal penalties. [...] (b) Driving while intoxicated or while ability impaired by drugs or while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs; aggravated driving while intoxicated; misdemeanor offenses. A violation of subdivision two, three, four or four-a of section eleven hundred ninety-two of this article shall be a misdemeanor and shall be punishable by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in a penitentiary or county jail for not more than one year, or by both such fine and imprisonment.	s. 255 – **Punishment** - (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable, (*a*) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely, (i) for a first offence, to a fine of not less than six hundred dollars, (ii) for a second offence, to imprisonment for not less than fourteen days, and (iii) for each subsequent offence, to imprisonment for not less than ninety days; (*b*) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and (*c*) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

The essential elements of the New York offence are as follows,

- Operate a motor vehicle (driving);
- Under the influence of alcohol;
- 0.08 of one per centum or more of blood alcohol level.

The essential elements of the *Criminal Code* are as follows,

- Operate a motor vehicle (driving) or has the care or control of a motor vehicle;
- Impaired by alcohol;
- Eighty milligrams or more of blood alcohol level.

It is clear that the provisions are equivalent and thus, Jane Doe needs to request the appropriate remedy from the Canadian government in order to be allowed to enter Canada. Since ten years have not passed from the completion of the sentence, Jane does not qualify for "Deemed Rehabilitation". However, as more than five years has passed since the completion of her sentence, she can submit an application for Rehabilitation to Citizenship and Immigration Canada.

Foreign Pardons:

There can be instances where the foreign national has received a foreign pardon and may not require rehabilitation. However, *be cautious* because CIC is not required to recognize the legitimacy of a pardon granted by a foreign government.

According to the Federal Court of Appeal in *Canada (MCI)* v. *Saini*, 2001 FCA 311, three elements must be established before a foreign discharge or pardon may be recognized:

> (1) the foreign legal system as a whole must be similar to that of Canada;
> (2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and
> (3) there must not be a valid reason not to recognize the effect of the foreign law.[8]

Magtibay[9] and her husband were citizens of the Philippines. Magtibay came to Canada under the live-in caregiver program and applied for permanent residence two years later. During the processing of her application, it was discovered that her husband had been charged with a sexual offence. He was acquitted because the victim had pardoned the aggressor, also known as the "*defence of pardon*". The visa officer concluded that he was inadmissible under section 36(1)(c) of the IRPA, because he had committed an offence which would have been punishable in Canada by a maximum term of imprisonment of at least 10 years.

Magtibay submitted an application for judicial review to Federal Court of the visa officer's decision. The issue was whether the visa officer erred in determining that, even though the husband received an acquittal, he was nonetheless inadmissible to Canada. In applying the tripartite test, the Federal Court concluded that the inadmissibility of Magtibay's husband did not rest on a conviction, but on the premise that the act in question was actually committed, although pardoned. The Court held that the content,

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[8] *Canada (MCI)* v. *Saini* [2001], F.C.J. No. 1577, at para. 24 and 28.
[9] *Magtibay* v. *Canada (MCI)* [2005], F.C.J. No. 498.

aim, purpose and effect of the foreign pardon was not similar to that of Canadian law and the "*defence of pardon*" by the victim was not found in the Canadian legal system.

Another example would be that in some foreign jurisdictions an individual's criminal record is automatically expunged after a certain length of time has expired without the commission further offences, i.e. some US states, Germany. Canada does not recognize this type of "*automatic*" pardon because it is not granted in a similar fashion to Canadian pardons, which always require an individual examination of the circumstances.

Foreign nationals who have committed an act outside of Canada that did not result in a conviction, may render the foreign national inadmissible as per subsections 36(1)(c) and 36(2)(c) of the IRPA. These sections have proven to be very difficult for immigration lawyers as the applicability of these sections has been broadened over time. Originally these sections were used as a means to prevent the admission of foreign nationals who have not yet been convicted or who are fleeing prosecution. The Immigration Manual clearly states that "*[t]hese provisions cannot be used in cases where a conviction has been registered and the officer is unable to find the appropriate evidence*"[10]. However, we have seen instances where these sections have been used as "back up", specifically in cases where there is doubt that a conviction abroad will correlate with a *Criminal Code* provision. In the case of *Magtibay* v. *Canada* (*MCI*) [2005], F.C.J. No. 498 (noted above), the Federal Court stated,

> It should be made clear that paragraph 36(1)(c) of the Act does not require a conviction for the accused crime, but simply its commission. In contrast, paragraph 36(1)(b) of the Act requires a conviction, not simply its commission. **It is therefore clear that Parliament intended to differentiate the two scenarios, and allow for the inadmissibility of a permanent resident or foreign national not only on a conviction, but also on the mere commission of certain acts.**
> Therefore, the immigration officer did not need to determine that a conviction had been obtained for a specific act, but simply that it had indeed been committed. Once this has been affirmed, the immigration officer must then determine if that act, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, and that, **regardless of whether or not a conviction was obtained.**[11] [emphasis added]

We also wish to point out that inadmissibility under section 36 must be based upon a ground of criminality. The Federal Court in *Zhong* v. *Canada* (*MCI*) [2004], F.C.J. No. 1971, has clearly stated that a foreign national does not become,

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[10] Immigration Manual entitled "*ENF 14 / OP 19 Criminal Rehabilitation*", at section 15.
[11] *Magtibay* v. *Canada* (*MCI*) [2005], F.C.J. No. 498, at para. 10 and 11.

> "a member of the inadmissible class of persons **described in subsection 36(2) for the sole reason that he or she has violated a prescription of the IRPA or the Regulations**. Subsection 36(2) of the IRPA provides that "A foreign national is inadmissible on ground of criminality for ... (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; ...". The sole purpose of that provision is to render inadmissible all those who do not meet the condition of admissibility prescribed by or under the IRPA."[12] [emphasis added]

In addition, the Federal Court in *Zhong* stated that section 33 of the IRPA allows facts arising from omissions to constitute inadmissibility, however, there "*must be in evidence information supportive of those elements necessary to base a finding of inadmissibility [or criminality] under subsection 36(2) of the IRPA...*"[13]

After the totality of the information has been considered, a positive or negative decision will be rendered. If a positive decision is rendered (rehabilitation is granted), the foreign national is advised of the outcome in a letter and is provided instructions on how to proceed with admission to Canada. If a negative decision is rendered (rehabilitation is *not* granted), the foreign national is advised in a letter that he/she will be refused entry to Canada. Although the Immigration Manual states that "[t]here is no requirement for reasons to be given"[14] recent jurisprudence suggests that "the duty to provide reasons is a salutary one"[15] and further that "in failing to provide "adequate reasons" the decision maker erred in law."[16]

PRACTICAL TIPS:

- Ensure that the foreign national falls under section 36 of the IRPA. Acts of Parliament are often amended to reflect technological advances and changes in Canadian societal attitudes, and thus, it is important to ensure that your client does indeed fall within section 36 of the IRPA.

- Check the foreign law and the law in Canada at the time of the application. Considering the fact that laws are constantly being altered and there may be delays between the passing of a bill/law and its coming into force (CIF) date, it is suggested that immigration practitioners check to ensure that the specific provision is still in

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[12] *Zhong* v. *Canada* (*MCI*) [2004], F.C.J. No. 1971, at para. 24. [*Zhong*] (See also: *Kang* v. *Canada* (*MEI*) [1981], F.C.J. No. 50, at para. 6)
[13] *Ibid*, at para. 25.
[14] Immigration Manual entitled "*ENF 14 / OP 19 Criminal Rehabilitation*", at page 24, at section 22.3.
[15] *S.A.* v. *Canada* (*MCI*) [2006], F.C.J. No. 659, at para. 14.
[16] *Ibid*, at para. 18.

force (i.e. valid law), and to be sure the correct provision is selected for equivalency purposes.
For Canadian legislation, we recommend conducting a search on LEGISinfo for the most up-to-date information on federal legislation. LEGISinfo can also be used to locate major speeches, check on the status of a Bill, review the history of a Bill, review recorded votes, read legislative summaries, obtain departmental information, etc. (see: http://www.parl.gc.ca/LegisInfo/Home.aspx?Language=E&Mode=1&Parl=41&Ses=1)

- Check the law at the time of the conviction. It may be helpful to point out the Canadian legislation at the time of the conviction and if favourable, use the information to your clients' advantage. The information may be used to explain the circumstances of the situation; the old legislation may provide important context and perspective as to how societal attitudes have changed.

- The equivalent Canadian statute must be an Act of Parliament. Municipal and provincial statutes are not applicable.

- Point out in submission letter why this is a meritorious case. We suggest your submission letter should address the following:
    a) What were the circumstances of the offence? What happened and why?
    b) Has the foreign national taken responsibility for their role in the conviction/act?
    c) Does the foreign national feel remorse or badly for what occurred?
    d) How many convictions and what were the sentences?
    e) Clearly outline the sentence and explain how each aspect has been fulfilled and refer to supporting documentation.
    f) Is this a pattern of behaviour? Has it happened before?
    g) Will it happen again? If no, then why not?
    h) Why should rehabilitation be granted in this case? Why is it a meritorious case?
    i) What is the reason the person wants to come into Canada? (i.e. to work, study, live)
    j) Are there any other circumstances or facts that should be considered with the assessment of this application? If so, be sure to point them out.

- If the person has been granted a "Conditional Discharge", then they do *not* need Rehabilitation. A Conditional Discharge is when a person is found guilty of a crime and upon completion of specified actions by the accused, no criminal record issues (no conviction) as regards the offense for which a conditional discharge was granted. The exceptions to this general rule, found thus far, are the state of New York and Colorado.

The NY court's criminal justice handbook states that a conditional discharge only occurs during sentencing, which only happens *after* a conviction. See: http://www.courts.state.ny.us/litigants/crimjusticesyshandbk.shtml#anchor753011
It is important to note that as a determination of guilt has been found, one might think that an immigration officer could proceed via section 36(1)(c) or (2)(c) of the IRPA; however *this is not the case*. CIC policy does not permit officers to proceed via this route as the policy clearly states:

> The "committing an act" inadmissibility provisions would generally **not** be applied in the following scenarios:
>
> [...]
> · the trial is concluded and **no conviction results** (for example, acquittal, **discharge**, deferral);
> [...][**emphasis added**] [17]

- Ensure the application for Rehabilitation is complete.
  Please note that although it is not on the checklist, the applicant **must** submit at least three (3) detailed letters of reference, along with the application forms, payment, and other supporting documentation. The letters should include the following information:
  - Date and contact information of the person who wrote the letter of reference;
  - Who is the writer (i.e. friend, family or co-worker) and what does the writer do for a living? (The writer should introduce her/himself)
  - How does the writer know the applicant and for how long?
  - The writer should describe a situation or personal memory about the applicant, one that provides information about the applicant's personality without saying it directly.
  - The writer should clearly state that he or she is fully aware of the conviction (if true) and should state whether the applicant is remorseful.
  - The writer should explain whether he/she believes the applicant is "rehabilitated".

Other cases of interest:

Kan v. Canada (MCI) [2000] F.C.J. No. 1886 – There is a significant difference between the Hong Kong "pardon" regime and the Canadian regime.

Kharchi v. Canada (MCI), 2006 FC 1160 – there is a difference between careless driving and dangerous driving – Careless driving is not punishable under Canadian criminal law – it falls within the scope of provincial highway codes.

[17] CIC immigration manual, *ENF 2/OP 18 – Evaluating Admissibility*, section 3.9

Li v. Canada (MCI) [1997], 1 F.C. 235 – offences must be compared to determine whether they are sufficiently similar.

Shum v. Canada (MCI), 2007 FC 710 – the conviction of the applicant's spouse "*is regarded as spent in Hong Kong*"; both parties agreed that this does not equate to a pardon as understood in Canadian law. However, the officer had to consider the fact that the conviction had been "spent" as it would have invited the officer to assess more carefully the seriousness of the offence, etc.

Thamber v. Canada (MCI), 2001 FCT 177 – the applicant's freedom from criminal activity for a prolonged period of time (ten or more years) must be considered - "*to omit perhaps the most important factor to be considered in such decisions constitutes a reviewable error*".

TAB 7a

Temporary Resident Permits and Authorizations to Return to Canada

Julianne McKenzie
Canada Border Services Agency

M. Mavrakis
Canada Border Services Agency

19th Annual Immigration Law Summit – Day One

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CONTINUING PROFESSIONAL DEVELOPMENT

Temporary Resident Permits and Authorizations to Return to Canada

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Introduction

The *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (IRPR) are the federal legislation pieces which govern immigration, both temporary and permanent, to Canada. Depending on individual circumstances, foreign nationals who are inadmissible to Canada under sections 34 to 42 of IRPA may be authorized to enter and remain in Canada using legislative provisions such as the Temporary Resident Permit (TRP) and the Authorization to Return to Canada (ARC).

Citizenship and Immigration Canada (CIC) is responsible for the policy and administration relating to the ARC and TRP; however, service delivery is shared between CIC and the Canada Border Services Agency (CBSA). According to the Instrument of Designation and Delegation, CIC has the authority to issue ARCs and TRPs at missions overseas and at offices within Canada, while the CBSA holds these authorities at ports of entry (POEs).

Authorization to Return to Canada

An ARC is a required document for foreign nationals (FNs) who have been the subject of a previous removal order to seek authority to re-enter Canada..

There are three types of removal orders: departure orders; exclusion orders and deportation orders.

Departure Order

a) If a FN receives a departure order and:
- leaves Canada within the required 30 days; and
- verifies their departure with a Canadian immigration officer at the port of exit,

they do not need an ARC; however, they may still be inadmissible. The FN may seek entry to Canada subject to any routine procedures (e.g. examination at the POE, application for a temporary resident visa, etc.).

b) If a FN leaves Canada without verifying their departure, or more than 30 days have passed since the departure order was issued, the departure order automatically becomes a deportation order and the FN requires an ARC (see deportation order section below).

Exclusion Order

a) If a FN is issued an exclusion order and:
- 12 months have passed since they left Canada; and

- they have a Certificate of Departure (IMM 0056B) showing the date they left Canada,

they do not need an ARC; however, they may still be inadmissible. The FN may seek entry to Canada subject to any routine procedures (e.g. examination at the POE, application for a temporary resident visa, etc.).

b) If a FN wishes to return to Canada less than 12 months after the exclusion order was issued, or if they do not have a Certificate of Departure, they will need to apply for an ARC.

Deportation Order

If a FN has been the subject of a deportation order at any time, they will need to apply for an ARC.

A FN who seeks to enter Canada and requires an ARC, but has either not received one, or not applied for one, is inadmissible for non-compliance under section 52 of IRPA, which states:

> **52. (1)** *"If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances."*

Section 52 of IRPA is intended to send a strong message to individuals to comply with enforceable departure orders. Consequently, an ARC is not used as a routine way to overcome this bar, but rather in cases where an officer considers the issuance to be justifiable based on the facts of the case.

Individuals applying for an ARC must demonstrate that there are compelling reasons to consider an ARC when weighed against the circumstances that necessitated the issuance of a removal order. Applicants must also demonstrate that they pose a minimal risk to Canadians and to Canadian society. Merely meeting eligibility requirements for the issuance of a visa is not sufficient to grant an ARC. The decision to grant an ARC should be consistent with the objectives of the legislation as defined in 3(1)(h) of IRPA *"to protect the health and safety of Canadians and to maintain the security of Canadian society."*

An incomplete or illegible application will be returned without being processed. The submission of an application for an ARC is not considered to be a guarantee that one will be issued.

When an officer assesses an application, they will consider, among other things:

- the reasons for the removal order;

- the possibility that the behaviour that caused the order to be issued will be repeated;
- the length of time since the order was issued;
- the current situation of the applicant; and
- the reason the applicant is seeking to enter Canada.

Application for an ARC should be made at an overseas visa office prior to arriving in Canada at a POE.

Temporary Resident Permit

A TRP is a document that authorizes a person who is inadmissible to Canada or does not otherwise meet the requirements of IRPA to enter or remain in Canada on a temporary basis, as per subsection 24(1) of the Act, which states:

> *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.*

At the POE, a border services officer (BSO) at CBSA's Immigration Secondary has the authority to issue a TRP to an inadmissible person seeking entry to Canada. TRPs issued at the POE by the CBSA account for three-quarters of the annual TRPs issued.

BSOs issue TRPs on a case-by-case basis, only in exceptional circumstances when the BSO is of the opinion that entry to Canada is justified. That means the benefits of allowing the FN to enter Canada must be sufficiently compelling to clearly outweigh any risk that the FN may pose to Canadian society. TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments.

The objectives of Canadian immigration legislation relative to the inadmissibility provisions are:

- to protect the health and safety of Canadians and to maintain the security of Canadian society;
- 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; and
- to ensure that decisions taken under the Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada.

Compelling reasons to warrant the issuance of a TRP are factors which make the person's presence in Canada necessary, such as family ties, job qualifications, economic contribution, temporary attendance at an event and national interest. The compelling reason must outweigh the risks to IRPA's objectives, such as protecting public health, the health care system, and the security of Canada and Canadians.

A TRP can be issued for a period of one day to three years. TRPs are only issued if justified by compelling circumstances and may be cancelled at any time. Depending on the inadmissibility, a TRP can lead directly to permanent residence. A client could apply for permanent residence after holding a TRP for a specified period of time. As such, the TRP is issued only for a very specific length of time to cover the necessary period of stay.

The total number of TRPs issued yearly is legislated to be reported on in CIC's Annual Report to Parliament.

How do ARCs and TRPs differ and which is appropriate in the circumstances?

An ARC can be issued for three uses:

1) For a permanent basis;
2) For a temporary basis, multiple entry; and
3) For a temporary basis, one time entry.

Granting an ARC may permanently overcome the effect of a removal order, whether the person is coming to Canada for permanent residence or for a temporary stay. In other words, it is similar to a pardon for criminal offences in Canada; it can permanently remove the previous record. Therefore, the ARC can remove the effect of the previous removal order. It does not, however, remove the inadmissibility.

Upon seeking entry at a POE, a FN must present proof that they have applied for and obtained an ARC, if required. Those that do not produce appropriate proof are considered inadmissible for non-compliance (A41 (a)) under IRPA. If an officer is of the opinion that the FN's circumstances justify entry to Canada, the officer may issue a TRP, which grants temporary resident status to the FN. In this case, the TRP overcomes the FN's inadmissibility for arriving at the POE without the necessary ARC. However, while a TRP can be used to overcome being inadmissible for non-compliance under IRPA, it does not permanently overcome the inadmissibility of not having an ARC. The next time the FN seeks to enter Canada, they will require an ARC.

When a FN applies for an ARC overseas, CIC can review and process all documents required to assess the FN's application for returning to Canada and require repayment of any removal costs incurred by the CBSA when the FN was previously removed.

At the POE, the TRP is a preferred option for temporary status because it temporarily overcomes the effect of a removal order. The FN obtains one admission, but after they leave Canada, the FN will still have the effect of the previous removal order and therefore, if they want to come back to Canada in the future, they will still require an ARC (or the issuance of another TRP).

Legislation permits the CBSA to issue a TRP at the POE to overcome a FN's requirement for an ARC. When a FN applies for an ARC overseas, CIC can review and process all documents required to assess the FN's application for returning to Canada and require repayment of any removal costs incurred by the CBSA when the FN was previously removed.

Using a TRP for a one-time, single entry allows the person to enter Canada, but does not overcome the effect of the removal order. Therefore, issuing a TRP may be a better option for a temporary, one-time entry as opposed to using an ARC, which would permanently (and perhaps inappropriately) overcome the removal order.

Practical Tips

ARCs:

- Before applying, consider why the FN was issued a removal order, as well as their current situation. For example, if they were deported because they were working illegally in Canada, are not currently employed and cannot prove strong ties to their home country, the officer is unlikely to be satisfied that the FN would respect the terms and conditions of their stay in Canada.
- If the circumstances that led to the removal order being issued have not changed, it is less likely that the FN will be given permission to return.
- If the FN is applying to come to Canada for any reason (visiting, studying, working or immigrating), they should not submit a separate application for an ARC. If the application is approved, the ARC will be dealt with in the context of that application. The FN will simply be asked to submit the fee.

TRPs:

- It is prudent to apply at a mission overseas rather than a POE, as the time and travel costs spent to come to Canada are not compelling reasons for a TRP.
- If the FN is a citizen of a visa-exempt country, the visa office responsible for the country or region may have their own application form for a TRP. The FN should verify with the visa office to find out about their specific application procedures.
- In cases of FNs from visa required countries who are inadmissible to Canada but wish to seek entry, they should submit their application for a Temporary Resident Visa, along with supporting documentation to explain why the FN is inadmissible and why it may be justified for the FN to enter Canada.

Applicable Case Law

There is not a substantial amount of case law regarding TRPs and ARCs, but two cases to note are as follows:

Farhat v. Canada (MCI) [2006] F.C.J. No. 1593

Betesh v. Canada (MCI) [2008] F.C.J. No. 1749