TAB 5

Underground Ethics: What Do You Do When Your Client Is Underground?

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5

19th Annual Immigration Law Summit – Day Two

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

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UNDERGROUND ETHICS
What Do You Do When Your Client Is Underground?
19th Annual Immigration Law Summit

Law Society of Upper Canada / Ontario Bar Association
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The Law Society of Upper Canada
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Lawyers engaged in the practice of immigration law will inevitably have contact with non-citizens who are 'underground', in that they have no status in Canada and have either remained when their lawful status in Canada expired, without reporting to immigration officials or the border police, never had lawful status in the first place, or have been involved in a status determination process and have decided not to continue with it, but rather to hide from Canadian officials.

There are several aspects to dealing with these kinds of cases. One is what remedies may be available to the person; another is how to go about seeking access to these remedies; and the third is the ethical issues which arise for counsel.

Remedies

A non-citizen may well be able to seek regularization of status from within Canada, even though he or she is without status and underground.[1] This is not intended to be an exhaustive list of options, available to those without status in Canada, but a brief overview.

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[1] *CIC Manual: IP 5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (IP-5 H&C), s. 5.1; "It is a cornerstone of IRPA that, prior to their arrival in Canada, foreign nationals who wish to live permanently in Canada must submit their application outside Canada and qualify for and obtain a permanent resident visa." But the Act provides for exemptions from this in respect of particular classes of persons, recognized refugees and other persons in need of protection, those authorized under s. 65 (permit holders) and 72 (live in caregiver class; spouse or common law partner in Canada class; and protected temporary residents class) and those who are permitted to remain for humanitarian or compassionate reasons under s. 25 of the Act. The Manual is at www.cic.gc.ca under publications.

If the person is at risk, she may make a refugee claim[2], or if ineligible, may make a Pre-Removal Risk Assessment (PRRA) application.[3] Even if the person was denied previously on a PRRA, a second one is not precluded, but it does not stay removal.[4]

The person may qualify under one of the inland landing classes, the most common being the spousal and common law partner in Canada class. While the regulatory program only covers those lawfully in Canada, immigration policy treats those without status as part of the class, if they otherwise meet the substantive criteria for the class, subject to several exceptions.[5] Those who are excluded from the policy, may be considered on general H&C grounds of which the marriage or common law relationship is but one factor.[6]

Non-citizens who have lived in Canada for some time, have strong ties to Canadians or permanent residents, and/or would face other hardships (as differing from risk[7]) in return

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[2] *Immigration & Refugee Protection Act*, s. 99

[3] *Immigration & Refugee Protection Act*, s. 101, s. 112

[4] *Immigration & Refugee Protection Regulations*, s. 162, 163, 165, 232

[5] *IP-5 H&C*, s. 5.5. Those who request H&C consideration to exempt them from inadmissibilities or other applicable requirements, such as the requirement to have temporary resident status, a passport or other documentation, will be processed as members of the class if they meet the requirements under s. 124 a) and c) of the *IRP Regulations*: that they be the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada and are the subject of a sponsorship application.

[6] *IP-5 H&C*, s. 5.13; 12.3.

[7] *IP-5 H&C*, s. 5.9; 5.15-5.16. Since June 29, 2010 [sic], risk factors as set out in s. 96 (Convention refugee) and s. 97 (person in need of protection) of the *IRPA* may not be considered in an H&C application: it is limited to 'hardship' (although it is difficult to ascertain how this distinction will be applied in practice). *IP 5 H&C*, s. 5.10 identifies this "unusual, undeserved or disproportionate" and as being of greater significance than a mere guideline, because a judge of the Federal Court adopted the phrase, referencing *Singh v. Canada (MCI)* 2009 CF 11, 2009 FC 11. The general understanding of H&C is not so limiting. The reasoning in *Chirwa v MEI*, [1970] I.A.B.D. No. 1 has been applied since 1970 to H&C appeals before the Immigration Appeal Division. It defines "compassionate considerations" as "those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another" and "humanitarian considerations"as "Regard for the

to their country, may apply to remain on humanitarian and compassionate grounds.

The discretion to exempt under s. 25(1) of the *IRPA* is considered exceptional.[8] The purpose is identified in the CIC Manual as allowing "flexibility to approve deserving cases not covered by the legislation. This discretionary tool is intended to uphold Canada's humanitarian tradition. Use of this discretion should not be seen as conflicting with other parts of the *Act* or *Regulations* but rather as a complementary provision enhancing the attainment of the objectives of the Act."[9] The factors which may be considered in an H&C application, in addition to the mandatory consideration of the best interests of children affected by the decision, are varied and non-exhaustive. Some are listed in the CIC Manual:

- establishment in Canada;[10]
- ties to Canada;
- the best interests of any children affected by their application;
- factors in their country of origin (eg. medical inadequacies, discrimination not persecution, harassment or other hardships not described in A96 and A97);
- health considerations;
- family violence considerations;
- consequences of the separation of relatives;[11]
- inability to leave Canada has led to establishment; and/or
- any other relevant factor they wish to have considered not related to A96 and A97.[12]

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interests of mankind, benevolence"; "Having feelings and inclinations creditable to man; kind, benevolent" - again a subjective word which is used objectively in the section.

[8] *IP-5 H&C*, s. 5.24. An outstanding H&C application is not a bar to removal, although it is fair to say that once a person is removed the H&C application becomes virtually illusory. If removal is not deferred, a person may seek a stay of removal until the H&C application is determined.

[9] *IP-5 H&C*, s. 2

[10] *IP-5 H&C*, s. 5.14; 11.4. The case to make is much more difficult if the person chose to remain, as opposed to being required to remain because of unsafe conditions in her country for eg.

[11] *IP-5 H&C*, s. 12

[12] *IP-5 H&C*, s. 5.11

Procedures

Applications to regularize one's status in Canada are made in writing and forwarded to a CIC central processing office, normally the principal processing centre in Vegreville, Alberta (CPC-V).[13] The applicant must include her address in the application and in this way is notifying the CIC of her whereabouts and how to contact her.[14]

The application may be sent to a local CIC for further processing. This occurs when an approved H&C application is finalized and the person is ready to be called in for the final examination and landing; when the H&C application raises issues of concern that cannot be easily addressed at the CPC-V, eg. complex cases; those requiring an in-depth assessment of bona fides or degree of hardship; and those received before June 29, 2010 which include allegations of risk but cannot be approved on non-risk H&C factors; or otherwise a personal interview is required.[15] Cases raising serious inadmissibility concerns are forwarded to Case Management at CIC National Headquarters for consideration.[16]

The CIC will interact with the CBSA in the processing of applications to regularize status from within Canada. CBSA is consulted in relation to cases involving suspected criminality, security and international human rights violations for example. Its opinion is sought on the person's admissibility. The CIC Manual contemplates notice to the CBSA that an applicant is in Canada without lawful status at the point that the person's H&C

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[13] *IP-5 H&C*, s. 8.1; presently H&C applications are sent to the Vancouver Backlog office.

[14] *IP-5 H&C*, s. 7.1 The forms which must be completed require that the person include address, phone number, work place, etc.

[15] *IP-5 H&C*, s. 8.1, 8.4

[16] *IP-5 H&C*, s. 8.7, 10; The Director of Case Review at the CMB-NHQ analyzes these cases to determine if exemptions are to be granted in respect of cases involving ss. 34, 35, 36(1), 37 and 38, *IRPA*. Only those cases receiving approval in principle would be forwarded to NHQ.

application is refused, unless a warrant is outstanding. Where there is a warrant outstanding, the CBSA is to be notified although it appears to be a matter of discretion as to when it is notified.[17] The Manual indicates for those otherwise without status whose applications are refused that a refusal letter should be sent informing the applicant that the exemption will not be granted and instructing her to leave, and

- if voluntary departure is appropriate, include instructions for confirmation of departure and follow up to see if client departs; if departure is not confirmed within the time allotted, notify CBSA that client is believed to be in Canada without status.
- if there is an outstanding removal order, inform the CBSA Removals Unit of the negative decision.[18]

In instances where the person is approved for landing in Canada, CBSA is not normally notified to take enforcement action.[19] Counsel cannot assure a client that coming forward to make an application will not result in enforcement action being taken. There are instances - not common, but occurring - where a non-citizen has made an H&C application, disclosed her address, and is arrested before the application is considered. This generally does not happen but it can. It may sometimes be appropriate, after an H&C application is filed, to arrange for the person to report voluntarily. The risk in this is that enforcement action may be initiated immediately, whereas if the person does not report she may well be left alone until a decision is made or close to being made. Where there is an outstanding warrant the person is more at risk of detention. Voluntary reporting should be arranged before the person reports to make arrangements for release.

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[17] *IP-5 H&C*, s. 5.25

[18] *IP-5 H&C*, s. 15, 17.1; if there is not a removal order already, the CIC officer could write a s. 44(1) report to initiate the removal process.

[19] *IP-5 H&C*, s. 15.3, *IRP Regulations*, s. 233. Where there is an outstanding warrant this will most likely be cancelled.

Giving Advice and Representation

Non-citizens regularly approach counsel for advice on their chances of being able to regularize their status in Canada. This raises ethical issues in respect of what advice is given. A lawyer cannot counsel a person to engage in unlawful conduct nor to continue with unlawful conduct.[20] This does not mean that counsel must call the border police to advise of the person's whereabouts.[21] Nor does it mean that counsel should play the role of a stern parent instructing the person to report to the border police immediately. The person knows that remaining in Canada without status is against the law and has come to counsel for advice, not a lecture. It goes without saying that counsel is required to provide honest and candid advice.[22] If the person has no viable option to acquire lawful status in Canada, then counsel should advise the person of this. It is the giving of advice in relation to options which may become viable over time, that presents more of a problem for counsel.

Counsel can and should explain options[23], recognizing that there is often a fine line to be drawn in the giving of advice. For example, if the person is involved in a common law relationship of less than a year, there is nothing improper with explaining to the person that

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[20] Relationship to Clients: *Rule 2.02 Quality of Service: Dishonesty, Fraud etc. by Client* - (5) When acting for a client, a lawyer shall not : (a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct; (b) advise the client on how to violate the law and avoid punishment.

[21] Relationship to Clients: *Rule 2.03 Confidentiality* - (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

[22] Relationship to Clients: *Rule 2.02 Honesty and Candour*

[23] Relationship to Clients: *Rule 2.01 Competence* - "competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises; (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action.

she may be eligible to be sponsored once she has lived in a common law relationship for a year. The result of this may be - in fact is likely to be - that the person will decide to continue underground for a longer time until she qualifies as a common law partner. So it is essential to be clear that counsel is not advocating that the person remain underground longer, but is advising the person as to the options available to her person to regularize her status in Canada.

The overarching obligation to a person who seeks legal advice is to ensure that she feels comfortable in disclosing her circumstances freely with counsel, knowing that counsel will fully canvass the legal options available and will keep the information in confidence.[24] There are few exceptions to this obligation.[25]

Where counsel agrees to assist a non-resident in making an application to regularize her status in Canada, it is of the utmost importance that counsel fully advise the person of what may occur, including the possibility of refusal, of detention, and of prosecution, even if these are not likely in the circumstances of the person's case.

Counsel cannot assist a person is presenting information which is not correct. The

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[24]The commentary for *Rule 2.03 Confidentiality* emphasizes: .... A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence. This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[25] Relationship to Clients: *Rule 2.03 Confidentiality (2)-(5)* - The exceptions include where counsel is required by law or an order from a competent tribunal to disclose; where the lawyer believes on reasonable grounds that there is an imminent risk of identifiable harm to an identifiable person or group; where the lawyer is criminally charged or facing a civil suit or disciplinary hearing concerning a client, but the disclosure is only to the extent required for the lawyer to defend himself; and where disclosure to the extent required is necessary in an effort to collect on fees owing."

person must be honest in completing the application forms. For example, an applicant cannot leave out work experience because it was done without a work authorization. If the person worked then it must be listed under work experience. Further, if counsel is aware of significant facts, counsel cannot continue to act for the person if she insists on not disclosing those facts. This could arise, for example, where the person admits to counsel that the marriage is one of convenience.

In the context of written applications for relief, removing oneself as counsel of record should not prejudice a person: it may be that the conflict arises before the application is even filed. It is only in instances where counsel cannot withdraw without harming the person that it may not be appropriate to withdraw. This could occur, for example, in an interview where the client provides information to an officer which counsel knows to be untrue. In this instance counsel may not be able to withdraw,[26] but certainly cannot in any way use the incorrect information to advance the person's case.[27]

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[26] Relationship to Clients: *Rule 2.09 Withdrawal from Representation (1)* A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances. The Commentary states: "No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril."

[27] Relationship to the Administration of Justice: *Rule 4.01 Lawyer as Advocate (1)* When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect. The commentary states: ".... The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done." Rule 4.01(2) sets out specific responsibilities of counsel: a lawyer shall not (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable, ... (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct.

Another difficult situation that arises is when counsel is acting for a person and that person goes underground in the course of a proceeding. This can and does happen where a stay is sought and refused by a judge of the Federal Court and the person decides not to leave. The obligation to maintain client confidentiality continues to apply: counsel cannot give the CBSA information on how to contact or locate her client without the client's authorization.[28]

It is not the opinion of this author that it is necessary to withdraw from acting for the client, as counsel is not responsible for the client's actions. It is likely that the Minister will bring to the Court's attention that the person has gone underground and no longer has 'clean hands'. It may be that counsel should advise the Court, particularly if the application record is still to be filed. In the Ministers' view, many applicants before the Federal Court do not have 'clean hands' as they are out of status for one reason or another and are thereby in breach of the *IRPA*.[29] The Federal Court of Appeal recognized in *Thanabalasingham*[30] that

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[28] Relationship to Clients: *Rule 2.03 Confidentiality*. (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so. The Commentary under (3) notes: "....Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rules 2.02 (5.1) and (5.2), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions." Those exceptions include defending oneself against a criminal charge, in a civil action or in a malpractice or misconduct matter.

[29] The clean hands principle is generally limited in its application to matters of wrongdoing related to the proceedings before the Court. As stated in *J.S.D. v. W.L.V.*, [1993] B.C.J. No. 82: "Two of the equitable principles or maxims which require consideration in this case in my opinion is the "clean hands" principle. Snell's Equity 29th Edition at page 31 states it as "He who comes into equity must come with clean hands." At page 32 the learned author states, "The maxim must not be taken too widely." He goes on to state "What bars the claim is not a general depravity but one which has "an immediate and necessary relation to the equity sued for." The BCCA reversed the judgement, but not by rejecting the principle, only its non-applicability in a child support claim ([1995] B.C.J. No. 653, at para. 30).

[30] *Thanabalasingham v MCI*, [2006] F.C.J. No. 20; 2006 FCA 14. at para. 9-11.

where a person did not have clean hands the Court nevertheless retained a discretion to either dismiss the case without considering it on the merits or to decide it on the merits:

> 9 In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has clean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
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> 10 In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.
>
> 11 These factors are not intended to be exhaustive, nor are all necessarily relevant in every case....

There are undoubtedly other aspects of practice in this area which raise ethical concerns. The *Law Society's Rules of Professional Conduct* and the *Paralegal Rules of Conduct* provide a comprehensive outline of the principles governing the legal profession. If there are specific concerns, the Law Society's Practice Management Help line is available to provide counsel with assistance in interpreting her professional obligations under the Rules. (416-947-3315 or 1-800-668-7380, ext. 3315)

TAB 5a

Immigration Warrants

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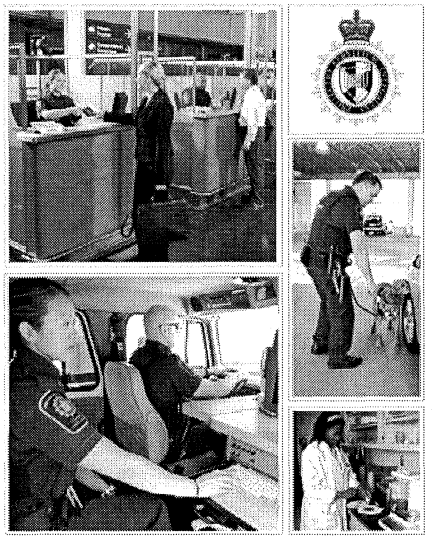
Immigration Warrants



Immigration Law Summit

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Canada Border Services Agency | Agence des services frontaliers du Canada

Canada

CBSA ASFC

Inland Enforcement Program

- The objective of CBSA Inland Enforcement is to identify, locate, and remove inadmissible persons from Canada.

- Ensure national consistency within the organization, effective communication between the regions and headquarters, proactive development of policies and procedures, and flexibility and adaptability in a constantly changing environment.

CBSA ASFC

Investigations Program

- Responsible for identifying individuals who are inadmissible to Canada. This can be done from file review, criminal court tracking, notification from police or tips from the public.

- Enforcement officers have the authority to arrest and detain both foreign nationals and permanent residents of Canada. To conduct an arrest, the officer must have reasonable grounds to believe the individual is inadmissible to Canada and that the individual is:
  - a danger to the public; or
  - unlikely to appear for a future immigration proceeding.

- CBSA officers may also arrest a foreign national if they are not satisfied of their identity in the course of any procedure under the *Immigration and Refugee Protection Act*.

CBSA ASFC

CBSA Warrants

- An immigration warrant may be issued where there are reasonable grounds to believe the person is inadmissible and is a danger to the public, and/or unlikely to appear for examination, admissibility hearing, or removal.

- Once a warrant is signed, it is sent from the local enforcement office from which it was issued to the Warrant Response Centre (WRC) in Ottawa which monitors and confirms the validity of all immigration warrants.

- The WRC inputs the warrant onto the Canadian Police Information Centre (CPIC) and provides support for CBSA officers and law enforcement agencies on immigration warrant matters.

CBSA ASFC

Investigation of Warrant Cases

- Individuals who are wanted on outstanding immigration warrants may come to the attention of the CBSA through a variety of scenarios:
  - Active CBSA investigation
  - Police investigation
  - Tip from the public
  - Turning themselves in to a local CBSA office
- The majority of immigration warrants are for failed refugee claimants who do not pose a threat to the Canadian public.
- The number of immigration warrants on CPIC does not necessarily reflect the actual number of people in Canada. Many are presumed to have left the country, but this can not be verified as Canada does not have exit controls.

CBSA ASFC

Location of a Warrant Case

- When an individual who is wanted on an immigration warrant is located, the CBSA officer has three options:
  - Execute the warrant and release on conditions;
  - Execute the warrant and detain the individual;
  - Cancel the warrant.

- Inland enforcement officers have discretion with respect to which of the aforementioned options they proceed with when they locate an individual who is the subject of an immigration warrant.

CBSA ASFC

Alternatives to Detention

- Depending on the circumstances following the arrest of an individual on an immigration warrant, the CBSA officer may order release and impose conditions as an alternative to detention, including:
  - Reporting conditions (bi-weekly, monthly);
  - Require a cash or performance bond from a guarantor;
  - Require the individual to report when requested to do so by a CBSA officer.

- Should an individual remain in detention, the Immigration Division of the Immigration and Refugee Board will review their detention within the first 48 hours, then within 7 days, and every 30 days thereafter

CBSA ASFC

Resolution of an Outstanding Warrant

CBSA Benefits

- CBSA no longer conducting an active investigation on this individual;
- Individual has been located and is in contact with the CBSA;
- Enforcement process can move forward, such as scheduling of the admissibility hearing, offering the pre-removal risk assessment, scheduling of removal arrangements.

Counsel – Client Benefits

- No issue in terms of representing this individual as they are now in contact with the CBSA;
- Clients gain access to processes that may allow them to remain in Canada, including pre-removal risk assessment;
- Clients are no longer concerned about the possibility of being arrested.

CBSA ASFC

Sanctuary

- The Government of Canada does not condone individuals who are wanted on an immigration warrant entering a place of worship to avoid removal.
- CBSA officers have the authority to enter a place of worship to arrest an individual wanted on an immigration warrant. These incidents are assessed on a case-by-case basis.
- Canada has an internationally recognized system for providing refuge for those fleeing persecution in their home country, and individuals who wish to remain in Canada should access these measures as opposed to seeking sanctuary.

CBSA ASFC

Questions?

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