Immigration consequences of Canadian criminal offences

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When criminal lawyers represent their clients, they may not always consider the immigration implications of the case. However, unless their client is a Canadian citizen, many criminal offences will have potentially adverse consequences. A brief discussion of immigration consequences arising from Canadian criminal offences is provided below.

Overview of criminality grounds

There are numerous grounds of inadmissibility contained in the *Immigration and Refugee Protection Act* [1] (IRPA). However, this article will focus on the grounds of criminal inadmissibility described in A36. Inadmissibility based on related grounds such as security (A34), human or international rights violations (A35), and organized criminality (A37) are outside the scope of this article.

There are two distinct grounds of criminal inadmissibility under A36: (a) serious criminality [A36(1)], and (b) criminality [A36(2)]. The criminality ground applies only to foreign nationals [2] (e.g., temporary workers, students and visitors). However, the serious criminality ground applies to both foreign nationals and permanent residents [3] .

If a foreign national or permanent resident is found inadmissible in Canada under A36, a removal order will normally be issued unless he or she is eligible for relief, including a Temporary Resident Permit (TRP) [a temporary waiver of inadmissibility] or a Rehabilitation [a permanent waiver of inadmissibility]. Seeking such relief is much more difficult in the case of serious criminality than in the case of criminality. However, a discussion of TRPs and Rehabilitations is outside the scope of this article.

The distinction between criminality and serious criminality is even more significant because, according to A64(1), a foreign national or permanent resident who is found to be inadmissible based on serious criminality will not be permitted to appeal the decision to the Immigration Appeals pision, if their crime was punished by a term of imprisonment of at least six months. In other words, an individual who is sentenced to at least six months of imprisonment for an offence that is considered serious criminality will lose his or her right to appeal a finding of inadmissibility.

The serious criminality ground

Under A36(1), foreign nationals and permanent residents are inadmissible to Canada for serious criminality if they:

1. Are convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
2. Are convicted of an offence outside Canada that, 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; or
3. Have committed an act outside Canada that is an offence in the place where it was committed and that, 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.

A36(2) addresses Canadian convictions, foreign convictions, and the commission of criminal offences outside of Canada. However, for the purposes of this article, only the immigration implications of offences committed in Canada [A36(1)(a)] will be discussed.

The criminality ground

According to A36(2), foreign nationals are inadmissible on grounds of criminality for:

1. Having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;
2. Having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
3. Committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or
4. Committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

A36(2) addresses Canadian convictions, foreign convictions, and the commission of criminal offences either outside or inside Canada. However, for the purposes of this article, only the immigration implications of offences committed in Canada [A36(2)(a) and A36(2)(d)] will be discussed.

Federal offences, provincial offences and juvenile offences

The references to “an Act of Parliament” mean that only offences arising from federal legislation will result in inadmissibility. This means that an offence under a provincial statute will not render someone inadmissible to Canada.

For example, a conviction for careless driving under the Ontario *Highway Traffic Act* [4] would not result in inadmissibility under A36(1) or A36(2). Therefore, an accused who is initially charged with dangerous driving under subsection 320.19(5) of the *Criminal Code* [5] (CCC) [which would be considered serious criminality] but who successfully has the charge reduced to careless driving would not be inadmissible under either A36(1) or A36(2).

In addition, not all federal offences will result in inadmissibility under A36. According to A36(3)(e), inadmissibility under A36(1) or A36(2) may not be based on:

1. An offence that is designated as a contravention under the *Contraventions Act* [6] ;
2. An offence where the person is found guilty under the former *Young Offenders Act* [7] , or
3. An offence for which the person received a youth sentence under the *Youth Criminal Justice Act* [8] .

Clearly, juvenile offences that are prosecuted under the *Youth Criminal Justice Act* or the former *Young Offenders Act* would not fall under A36(1) or A36(2).

Conviction generally required

The references to “convicted” mean that an actual conviction must occur before inadmissibility will result. Therefore,

dispositions that do not result in a conviction will not result in inadmissibility under A36(1)(a) or A36(2)(a). Examples of dispositions that are not considered convictions include the following (among others):

1. Pre-trial persion;
2. An acquittal or stay of proceedings;
3. An absolute or conditional discharge; or
4. A recognizance under CCC 810 or a common law peace bond.

On the other hand, a suspended sentence is considered a conviction. [9] Therefore, if the accused is given a suspended sentence, it can still result in inadmissibility under either A36(1)(a) or A36(2)(a).

Committing an offence on entering Canada

According to A36(2)(d), a foreign national may be found inadmissible for criminality (there is no equivalent provision for serious criminality) if he or she commits a prescribed offence upon entering Canada, even if charges are never laid. According to Section 19 of the *Immigration and Refugee Protection Regulations* [10] (IRPR), for the purposes of A36(2)(d), the prescribed offences include **indictable offences** under the following Acts of Parliament:

1. The CCC;
2. The IRPA;
3. The *Firearms Act* [11] ;
4. The *Customs Act* [12];
5. The *Controlled Drugs and Substances Act* [13]; and
6. The *Cannabis Act* [14].

Of course, the “committing an offence” provision should not be applied if the foreign national or permanent resident has actually been charged. Chapter 2 of the *Enforcement Manual* (ENF 2) states the following:

It is important to note that it is not the government’s intention that the A36(2)(d) provision be used as an alternative to prosecution. In fact, when charges are laid, officers are to await the disposition of those charges before alleging inadmissibility under any of the criminality provisions.

If charges have been laid but are still pending, or if the final disposition of the charges did not result in inadmissibility (for example, a discharge or a peace bond), A36(2)(d) should not be applied.

Treatment of indictable offences, summary conviction offences, and hybrid offences

Indictable offences

Indictable offences clearly result in inadmissibility to Canada. However, whether they will be considered serious criminality or criminality will depend on:

1. The maximum penalty for that particular indictable offence; and
2. The penalty actually imposed.

If the maximum penalty for the indictable offence is at least 10 years of imprisonment, it is considered serious criminality. In addition, if the actual penalty imposed is more than six months of imprisonment, it will be considered serious criminality, even if the maximum penalty is less than 10 years of imprisonment.

Summary conviction offences

A single summary conviction will not result in inadmissibility under A36(1) or A36(2). However, A36(2) states that two or more summary convictions (not arising out of the same occurrence) will result in inadmissibility based on

criminality.

Hybrid offences

A majority of criminal offences contained in the CCC are considered hybrid offences. In such cases, the Crown may elect to proceed with the case either summarily or by indictment.

One might assume that, if the Crown elects to proceed summarily, a determination of inadmissibility will be based on the maximum penalty that may be imposed for a summary conviction under that hybrid offence. Unfortunately, according to A36(3)(a), for the purposes of A36(1) and A36(2), an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily.

As a result, even relatively minor hybrid offences that would typically be prosecuted summarily will be deemed to be indictable offences for the purposes of A36(1) and A36(2). For example, simple assault under CCC 266 is considered criminality because it falls under A36(2). However, it would not normally fall under A36(1), since the maximum penalty that could be imposed for an indictable offence under this section is five years (and not 10 years) of imprisonment. That said, it may still fall under A36(1) if the foreign national or permanent resident is actually sentenced to a term of imprisonment of more than six months.

Conditional sentences

In *R. v. Proulx* [15] , the Supreme Court of Canada (SCC) took the position that conditional sentences were essentially sentences of imprisonment served in the community. Therefore, a conditional sentence of more than six months could cause the accused to be inadmissible for serious criminality under A36(1)(a).

Fortunately, the SCC recently confirmed that conditional sentences should not be considered when determining inadmissibility under A36(1)(a). In *Tran v. Canada (Public Safety and Emergency Preparedness)* [16] , the SCC stated the following:

[T]he seriousness of criminality punished by a certain length of jail sentence is not the same as the seriousness of criminality punished by an equally long conditional sentence. Conditional sentences, even with stringent conditions, will usually be more lenient than jail terms of equivalent duration, and generally indicate less serious criminality than jail terms. Since a conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders, interpreting “a term of imprisonment of more than six months” as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality.

As a result of *Tran v. Canada*, a foreign national or permanent resident who receives a conditional sentence of more than six months for an indictable offence that is not punishable by at least 10 years of imprisonment will not be inadmissible based on serious criminality.

When the criminal penalty is to be determined

Penalties for several criminal offences contained in the CCC have recently increased, which raises the question of when the maximum penalty should be determined. Should the maximum penalty in force at the time of the commission of the offence be considered or should the maximum penalty in force at the time of the admissibility determination be considered instead?

For example, when the Government of Canada legalized recreational marijuana, it also passed Bill C-46 [17] , which increased the maximum penalties for impaired driving on December 18, 2018. Bill C-46 was an attempt by the

Government of Canada to demonstrate that it would not tolerate impaired driving of any kind.

Prior to Bill C-46, impaired driving (where no bodily harm or death occurs) under the former CCC 255(1) was a hybrid offence. If the Crown proceeded by indictment, the maximum penalty that could have been imposed was five years of imprisonment. Therefore a conviction under the former CCC 255(1) would have been considered criminality under A36(2) but not serious criminality under A36(1).

As a result of Bill C-46, the offence of operating a vehicle while impaired (where no bodily harm or death occurs) appears in the new CCC 320.19(1). CCC 320.19(1) states that the Crown may elect to prosecute such a case as a summary conviction or as an indictable offence. If the offence is prosecuted by indictment, the maximum penalty is imprisonment for a term of not more than 10 years. In other words, impaired driving is now considered serious criminality under A36(1).

Fortunately, the SCC also confirmed in *Tran v. Canada* that the penalty in force at the time of commission of the offence would control. In that decision, the SCC stated the following:

The phrase “punishable by a maximum term of imprisonment of at least 10 years” in s. 36(1)(a) of the IRPA refers to the maximum term of imprisonment available at the time of the commission of the offence, and is to be understood as referring to the circumstances of the actual offender or of others in similar circumstances. This interpretation aligns with the purpose of the IRPA, as outlined in s. 3. The IRPA aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The obligation of permanent residents to behave lawfully includes not engaging in “serious criminality” as defined in s. 36(1); however, that obligation must be communicated to them in advance. While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between permanent residents and Canadian society without clearly and unambiguously doing so. Section 36(1) (a) must be interpreted in a way that respects these mutual obligations. In the absence of an indication that Parliament has considered the retrospectivity of this provision and the potential for it to have unfair effects, the presumption against retrospectivity applies. Accordingly, the relevant date for assessing serious criminality under s. 36(1) (a) is the date of the commission of the offence, not the date of the admissibility decision.

Although *Tran v. Canada* specifically addressed serious criminality under A36(1), it should apply equally to A36(2). So an offence that was considered a summary conviction offence at the time that it was committed, but later became a hybrid offence due to a subsequent amendment, would still be treated as a summary conviction offence for the purposes of A26(2).

Effect of record suspensions and pardons

According to A36(3)(b), inadmissibility under A36(1) and A36(2) may not be based on a conviction in respect of which a Record Suspension has been ordered, and has not been revoked or ceased to have effect under the *Criminal Records Act* [18] . Pardons granted under the *Criminal Records Act* prior to its amendment by the *Safe Streets and Communities Act* [19] also have the same effect.

Conclusion

Clearly, many Canadian criminal cases will have potentially serious immigration implications. For this reason, practitioners should consult with a qualified immigration professional at the early stages of any criminal proceedings. For more information, please contact Henry J. Chang.

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1 S.C. 2001, c. 27.

2 According to A2(1), “foreign national” means a person who is not a Canadian citizen or a permanent resident, and includes a stateless

person.

3 According to A2(1), “permanent resident” means a person who has acquired permanent resident status and has not subsequently lost that status.

4 R.S.O. 1990, c. H.8.

5 R.S.C., 1985, c. C-46.

6 S.C. 1992, c. 47.

7 R.S.C., 1985, c. Y-1.

8 S.C. 2002, c. 1.

9 *Enforcement Manual, Chapter ENF 2*.

10 SOR/2002-227.

11 S.C. 1995, c. 39.

12 R.S.C., 1985, c. 1 (2nd Supp.).

13 S.C. 1996, c. 19.

14 S.C. 2018, c. 16.

15 [2000] 1 SCR 61.

16 [2017] 2 SCR 289.

17 S.C. 2018, c. 21.

18 R.S.C., 1985, c. C-47.

19 S.C. 2012, c. 1.

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