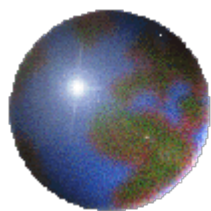


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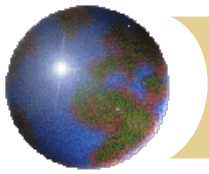
IMMIGRATION | LAW OFFICE



IMMIGRATION LAW TO CANADA – INADMISSIBILITY ISSUES

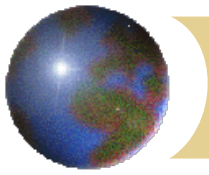
David H. Davis

Davis Immigration Law Office



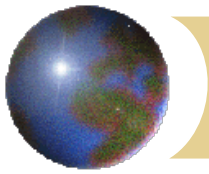
FIRST MEETING WITH CLIENT

- ✚ Establish citizenship of your client
- ✚ Sometimes place of birth is NOT necessarily determinative of citizenship
- ✚ Example: child born in KSA to a father who is citizen of Egypt=child is cit of Egypt
- ✚ Establish what their exact immigration status in canada: illegal, pr, visitor, worker, student.



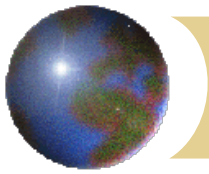
Division 4 of the IRPA sets out grounds of inadmissibility

- ⊕ Immigration consequences depend on status
- ⊕ Must ascertain status at first meeting
- ⊕ Three types:
 1. **Citizen** – most stable but could lose ppt privileges and/or becoming ineligible to sponsor relatives.
 2. **Permanent resident** – relatively secure but can lose status if found inadmissible for serious criminality, organized criminality or misrepresentation
 3. **Foreign national** – anyone who is not a Canadian citizen or permanent resident. FN's require authorization to enter Canada and to be able to work or study



General Comments

- ✚ FN's have less rights to appeal removal orders based on criminality.
- ✚ Persons seeking protected person status can lose the opportunity to make a refugee claim if found inadmissible for serious criminality.
- ✚ Certain convictions or sentences could affect the ability to sponsor relatives, eligibility to apply for citizenship or access to travel documents.
- ✚ IRCC and CBSA officers will always assume that an electable offence is proceeded by way of indictment even if the prosecution proceeded summarily.
- ✚ Convictions under Provincial statutes cannot give rise to inadmissibility decisions.
- ✚ DEFN's: IRCC, CBSA, FN, PR etc. are dealt with in the last slide



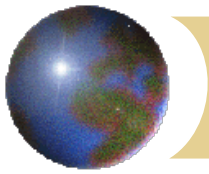
s.36(2) of IRPA - Simple Criminality & s. 36(1) Ser. Crim.

- ✿ Only affects FN's: S. 36(2) reads: An FN is inadmissible on grounds of criminality for
 - (a) Having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

SERIOUS CRIMINALITY – s. 36(1)

A PR or an FN is inadmissible on grounds of serious criminality for:

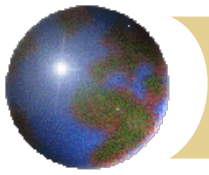
- (a) Having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
- (b) Having been convicted of an offence 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
- (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 offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.



s. 36(1) continued

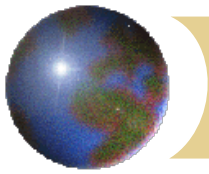
DISTINCTION BTW s. 36(1) and (2):

- Consequences of s. 36(1) inadmiss are more severe for FNs and any relief is more severe and more onerous
- Someone inadmiss under s. 36(1) will also be ineligible to make a refugee claim
- *PERMANENT RESIDENTS AND APPEAL RIGHTS:*
 - ❖ a PR or Protected Person(PP) may have a right to appeal the order of removal to the IRB Appeal Division, that has the power to stay the removal on H&C grounds
 - ❖ Stay of removal with conditions is a common result in a removal order appeal for criminality when the appeal is not dismissed.
 - ⊕ June, 2013 the threshold for loss of appeal rights for in-Canada convictions was lowered from 2 years of imprisonment to 6 months. As a result PR does not have appeal right to IRB – AD (see s. 64(1) and (2))
 - ⊕ No longer any appeal rights with respect to inadmissibility for foreign conviction under s. 36(1)(b) or (c).



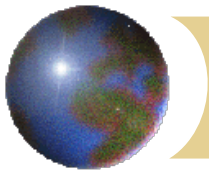
Rehabilitation

- ✚ S. 36(3)(c) of the IRPA and sections 17 and 18 in the IRPR set out the criteria for deemed rehabilitation and eligibility periods to apply for rehabilitation.
- ✚ If convicted of offences described in 36(1)(b) or (c) and (2)(b) or (c) then you are eligible to apply for rehabilitation five years after completion of sentence. So if probation order is in effect for 2 years after date of conviction the rehab period starts counting after full completion of any fine, restitution payment or prob period.
- ✚ Individuals may be deemed rehabilitated after 10 years for convictions or the commission of an offence described under s. 36(2)(b) or (c) respectively.



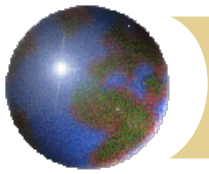
Rehabilitation cont'd

- ✚ Convictions under the Young Offenders Act cannot be used as a basis of determining inadmissibility
- ✚ **However, if youth is treated like an adult then the exemption under s. 36(3)(e)(iii) will not apply**
- ✚ A determination of whether a PR committed an offence under 36(1)(c) must be based on a balance of probabilities
- ✚ Only way someone who falls within 36(1)(a) and (2)(a) can be admissible is if they applied for and received a record of suspension
- ✚ Otherwise the person would need to apply for PR based on H&C grounds and demonstrate they are rehabilitated.



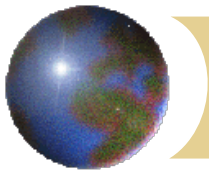
Committing an Offence outside Canada

- ✚ Reference to s. 36(1)(c) and (2)(c) deal with offences *committed* outside of Canada do not require that the person be arrested, charged or even investigated for the offence in question.
- ✚ Reference to IRCC Policy Manual entitled ENF 2: an officer in possession of intelligence or other credible info indicating person committed offence outside Canada;



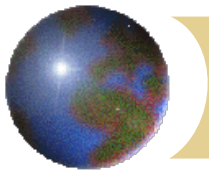
Offences outside Canada cont'd

- ⊕ Authorities in foreign juris. Indicate alleged offence is one where charges would be, or may be, laid;
- ⊕ Person is subject of a warrant where a formal charge is to be laid;
- ⊕ Person is fleeing prosecution in a foreign juris.



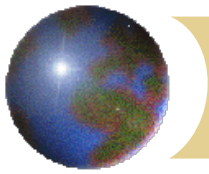
Committing an Offence Upon Entering Canada

- ❖ 36(2)(d) renders FNs inadmissible for committing prescribed offences upon entering Canada
- ❖ Effect is to allow for rapid removal of a person found committing an offence upon entry, if charges are not laid
- ❖ S. 19 in IRPR prescribes all offences under the CCC, IRPA, Firearms Act, Customs Act and Controlled Drugs and Substances Act.



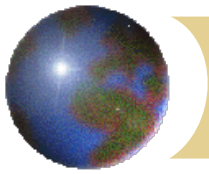
Offences committed upon entry cont'd..

- ⊕ Note: CBSA commenced consultations in NOV 17 to add offences in Cannabis Act to the list of prescribed offences. The effect is that the new offences in the Cannabis Act could render FNs inadmissible without a charge or conviction if committed upon entry to Canada.



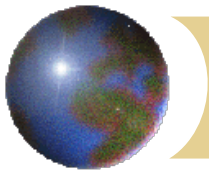
BILL C-46 DRIVING OFFENCE CHANGES as at DEC. 18TH/18

- ⊕ Increased penalty for DUI to 10 years from 5 years, has the effect of changing the offence from simple criminality to serious criminality. DUI in Canada is now classified as Serious Criminality as per s. 36(1)(a) in the CCC so an FN could be deported for having such conviction as at DEC. 18TH/18.
- ⊕ It therefore affects not only FN's but also PR's(permanent residents)
- ⊕ PR's can face deportation if their jail sentence is 6 months or more losing their equitable appeal right to the IRB – IAD.



Rehabilitation options for convictions of Impaired Driving

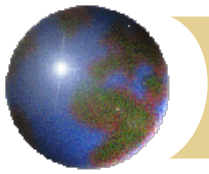
- ✚ The common form of relief called TRP or temporary resident permit (s. 24 in IRPA) for FN's to be able to enter Canada, can no longer be issued by a minister delegate but would now require approval of a Program Manager or Director. The level of scrutiny is at a much higher level than before as a result of the DUI changes.
- ✚ The Deemed Rehab provision would also no longer apply regardless of how old the DUI conviction might be, and an application for rehabilitation would be required.
- ✚ CBSA is not going to take serious action if someone who otherwise has a clean record and is a good standing member of society. But of course the threat is there.



FOREIGN OFFENCES and EQUIVALENCY

There are 3 approaches to evaluating equivalency as set out by the Federal Court of Appeal in HILL:

1. By 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 the existence of an offence in Canada from the essential ingredients of the respective offences

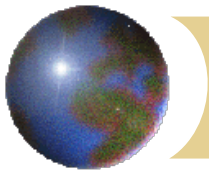


Equivalency continued..

2. By examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that 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; and,

3. By a combination of one and two.

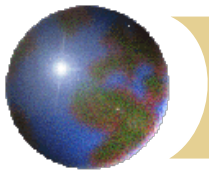
Hill v. MEI (1987), 1 Imm. L.R.(2d)1 at para16.



Equivalency cont'd..

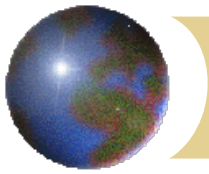
- ✿ The key to equivalency analysis is to focus on the essential elements of the offence rather than the particular wording of the foreign statutes or the exact names given to offences.
- ✿ The issue is not whether the foreign law uses the same words to describe the offence but if the essential elements are equivalent.

Brannson v. MEI [1981] 2 F.C. 141 (FCA)



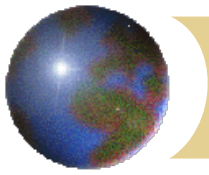
Equivalency cont'd

- ✿ There is a problem when assessing equivalency in jurisdictions like USA related to cannabis.
- ✿ Cannabis related activities at the State level can be authorized but prohibited at the federal level in USA.
- ✿ For instance, a person operating a cannabis-distribution business in Colorado or Washington in compliance with state law is “committing an offence” in relation to federal US law. Then in the equivalency analysis there would arguably be an equivalent offence in Canada of cannabis distribution not authorized under the Cannabis Act.



BILL C-45 Cannabis Act offences

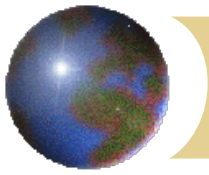
- ✚ Certain types of cannabis products for personal possession will remain prohibited as they are described as *illicit cannabis*
- ✚ Reference to s. 8 of the Cannabis Act which is a hybrid offence and which if convicted of simple possession of “illicit cannabis” the FN could be inadmissible
- ✚ More complicated is the fact that all cannabis possession in USA arguably constitutes possession of “illicit cannabis”, such that a single conviction for personal possession outside Canada could render a FN inadmissible.



Cannabis Act cont'd

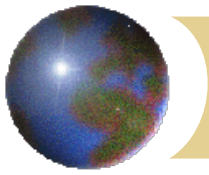
✚ CONCLUSION:

It appears to be very permissive with respect to personal possession of cannabis, but in effect it increases the immigration consequences of many cannabis-related activities outside Canada and for dealings with “illicit cannabis” inside Canada.



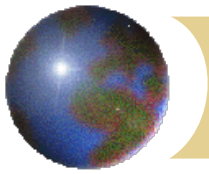
RETROSPECTIVITY

- ✚ The question of which regime will apply to non-citizens may have significant implications.
- ✚ Refer to the SCC decision in *Tran v. Canada* (Public Safety and Emergency Preparedness), [2017] 2 SCR 289, 2017 SCC 50 -- addressed retrospectivity in relation to s. 36(1)(a) and convictions inside Canada.
- ✚ See para. 41 where the Court held that PR's too must be able to "plan their lives". When Mr. Tran committed his offence, he could not have been aware that doing so was an act of "serious criminality" that might breach his obligations and lead to deportation. Thus, the operative date to be analyzed is **what the criminal offence was at time of assessing admissibility.**



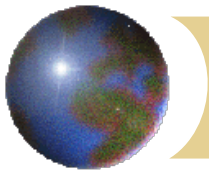
Restrospectivity cont'd

- ✪ The Federal Court has not dealt with this issue after Tran
- ✪ Earlier Federal Court decisions found that the relevant frame of analysis is the time at which inadmissibility is being assessed and not the time of commission of the offence. For eg. See *Edmond v. MCI*, 2012 FC 674 at para. 21.
- ✪ if convicted in the past under the CDSA for personal possession then a good argument could be made that it is equivalent of contravening the “illicit cannabis” provisions, as most cannabis is currently illicit by defn. under the CDSA.



STRADDLE OFFENCES

- ❖ The criminal courts have consistently found that the accused should benefit from the lesser penalty.
- ❖ In the IRB Immigration Division, the Board held that since the criminal courts applied the lesser penalty then the same should be followed by the Board in the immigration context.

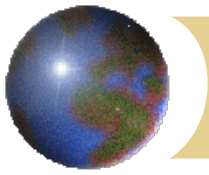


Organized Criminality

✚ Refer to s. 37 of the IRPA:

37(1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

- (a) Being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or



Organized Criminality cont'd..

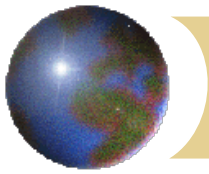
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

The evidentiary standard applied is as stated in s. 33 ...reasonable grounds to believe...

It is not uncommon to see s. 37 deployed where a conviction in Canada cannot be obtained or even in cases where charges are never laid.

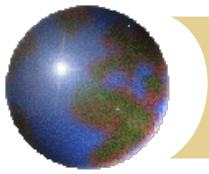
The only relief is where an exemption from the Minister of Public Safety is made personally as per s. 42.1 of the IRPA which could take many years to process. So its not very practical.

- ❖ Main issue is about membership. See SCC decision in B010 v. CANADA(citizenship & immigration), [2015] 3 SCR 704 at para.'s 41-46.



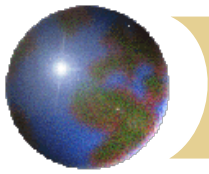
Misrepresentation

- ⊕ Misrepresentation s. 40 in IRPA.
- ⊕ Material fact
- ⊕ No discretion
- ⊕ Very difficult to appeal
- ⊕ Will result in a 5 year bar to re application
- ⊕ The bar is set very low for immigration officers to find applicant's make misrep



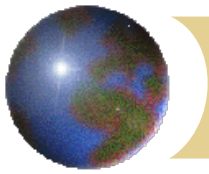
CANADIAN CITIZENSHIP ACT

- ⊕ Conditional discharges under s. 730 in CCC are not convictions so the prohibition in s. 22(2) of the Citizenship Act does not apply.
- ⊕ Citizenship cannot be granted to persons on probation (s. 22(1)) and you cannot attribute days on probation to count towards residency days.
- ⊕ If the crown elects summary it is treated as such in the Cit. Act. This Act does not have a similar provision such as s. 36(3) in IRPA. No deemed Indictable. See *Ahmed* 2009 FC 672



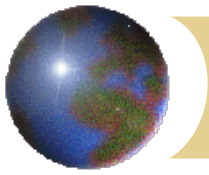
PLEA NEGOTIATING

- ✚ Pre trial custody is taken into consideration by CBSA when calculating the six month rule. See *DIOP v. Min of Public Safety and Emergency Preparedness, IAD FILE NO. MB6-03074/MB7-24563, May 8/18 Madame A. Lafleur para. 22 - 25*
- ✚ Conditional sentences are not considered “terms of imprisonment” – 2 yr cond’l sentence does not affect appeal rights and the person is not considered serious criminality
- ✚ But, consecutive sentences are not taken into consideration by CBSA. You can have a 5 month sentence for one charge consecutive to a 2 month sentence for another. The combination adds to more than 6 months but the charges are viewed separately. See *Kargbo v. The Queen, MBQB OCT. 19/18 Dewar J. at p. 4*



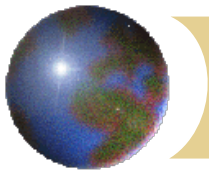
Plea Negotiating cont'd

- ✿ If entering a plea for a lesser included offence, I recommend a new court information is prepared so that the OTHER OFFENCE is not even referred to such as simple possession from PPT. or THEFT under from ROBBERY. Eg. If plea to lesser included offence, what if RCMP CRIM RECORD report does not included the lesser offence but rather relies on the original charge? Sexual assault vs. common assault.
- ✿ See MBCA decision in *The Queen v. Ali*, 2015MBCA64 at para. 11 and 12 Mainella JA for the Court stated that counsel must bring up immigration status as part of offender's background, or failing that the Judge must ask about it. Cited SCC decision in *R. v. Pham*, 2013 SCC 15 at para. 13.



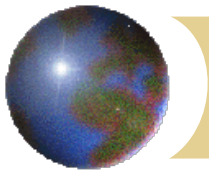
KNOWING PARTICULARS FROM THE CROWN

- ⊕ Be sure to read the particulars carefully to know “all of the charges the client is facing” and then discuss that with the client
- ⊕ Real case going on now – Provincial offences under TAMTA – tobacco act of Manitoba. But client also charged under the criminal code. Offence notice only refers to the provincial offence. Client unaware of CCC charge as well.
- ⊕ Client applies for PR status and says NOT FACING ANY CCC charges. But CBSA confronts client later.



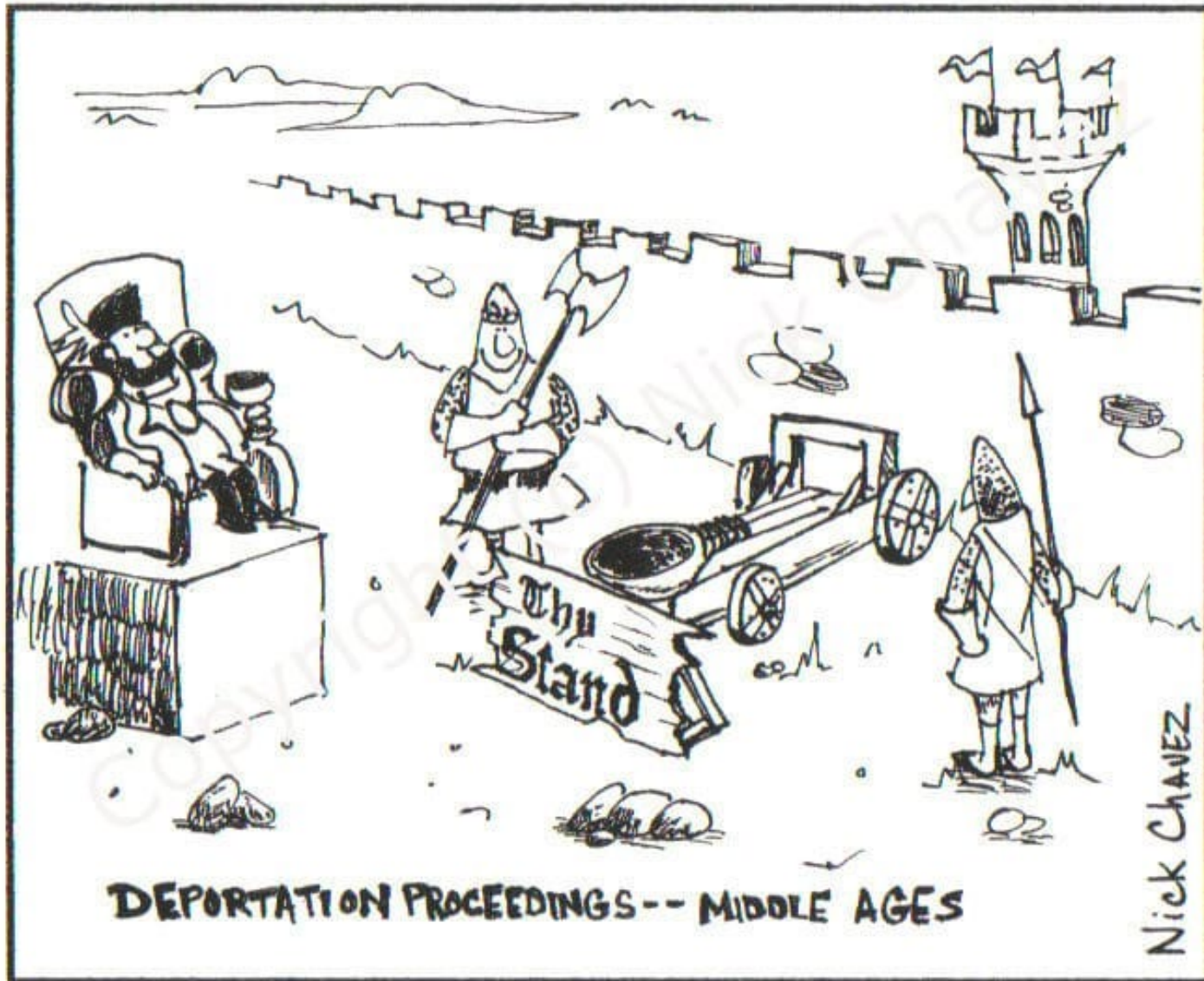
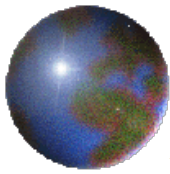
REPORT ON INADMISSIBILITY

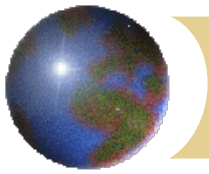
- ⊕ s. 44 of the IRPA
- ⊕ - investigation stage
- ⊕ - letter goes out to the person concerned
- ⊕ - like a fairness letter- issue is identified and they are given a chance to reply and make their case.
- ⊕ If case met and CBSA officer believes report is well founded then its referred to Ministers rep. another officer within CBSA. Then its referred to the IRB ID division for a hearing. Result is REMOVAL ORDER – deportation order or exclusion order.
- ⊕ Its possible to try to persuade cbsa officer NOT to proceed with a s. 44 report.



STRATEGY WHEN CLIENT RECEIVES PFL

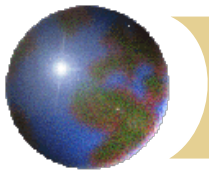
- ❖ Client receives procedural fairness letter in mail as a result of recent conviction for serious criminality
- ❖ Was client made aware of immigration consequences at time of pleading/sentencing/conviction: see *R. v. Wong*, 2018 SCC 25
- ❖ Reconsideration of Minister's decision to refer case under s. 44(2) in IRPA: see *Hernandez v. MCI* 2005 FC 429





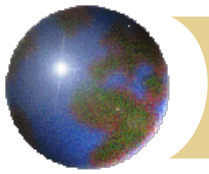
US IMMIGRATION

- ⊕ US CBP will deny entry to a Canadian if they have been convicted of an offence that is considered to be a crime involving moral turpitude (CIMT).
- ⊕ The seminal case that discusses this is MATTER OF HRANKA 1978 BIA decision:
 - assess risk of harm to society if applicant is admitted
 - seriousness of the immigration or criminal law conviction
 - nature of the reason's for the entry of the applicant into USA – reasons for entry do NOT have to be compelling



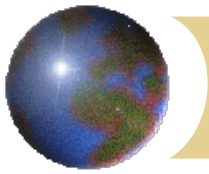
APPLICATIONS FOR WAIVER OF INADMISSIBILITY

- ⊕ I-192 is the waiver form to be completed
- ⊕ Govt. fee is \$585usd – as well as RCMP crim record report, 2 ppt sized pics, at least 3 letters of reference. I recommend also including any info about past criminal history.
- ⊕ You can complete and submit at the PFI AT OUR WPG AIRPORT
- ⊕ You can call CBP office there and set up an apptmt for the 10pt fingerprints to be completed and submission of the waiver application which is forwarded to the ARO based outside of WASHINGTON, DC. PHONE: 204-783-2340.



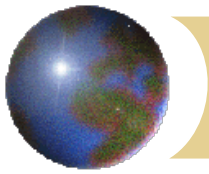
APPLICATIONS FOR WAIVER OF INADMISSIBILITY (cont'd..)

- ⊕ Hierarchy for decision making: wpg area is under CALGARY, AB jurisdiction and Calgary reports to DC.
- ⊕ Waivers after DEC/02 are for a maximum of 5 years
- ⊕ Processing time will vary but usually done in 6 months.
- ⊕ Crimes where ABSOLUTE DISCHARGE issues are NOT CIMT
- ⊕ Crimes where CONDITIONAL DISCHARGE issues are CIMT
- ⊕ Pardons for the offence may not matter and the person can still be CIMT.
- ⊕ Eg. FRAUD, ROBBERY, THEFT ETC ARE ALL CIMT
- ⊕ CRIM NEG CAUSE DEATH IN A MV CASE IS NOT CIMT.



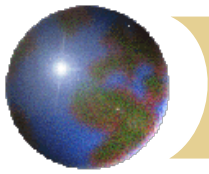
PETTY OFFENCE PROVISION

- ✚ The "petty offense" exception is available only for a "crime involving moral turpitude" conviction - inadmissibility under INA section 212(a)(2)(A)(i)(I). It is not available for any type of drug offense - inadmissibility under INA section 212(a)(2)(A)(i)(II).
- ✚ If convicted, the maximum statutory sentence to confinement may not exceed one year, and the actual sentence imposed must not exceed six months. A suspended sentence counts as a sentence imposed; a period of probation does not count as a sentence imposed.



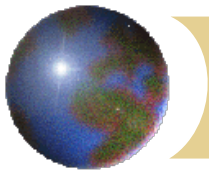
PETTY OFFENCE PROVISION (contd)

- ❖ Client must have COMMITTED only one such crime involving moral turpitude (even if never arrested and/or convicted of more than one offense).
- ❖ One area to look at is offenses committed under age 18. Adjudications of juvenile delinquency are not considered to be criminal convictions - the standards of the United States Federal Juvenile Delinquency Act apply to actions/offenses committed under age 18 in a foreign country to determine whether the foreign treatment constitutes a conviction for U.S. Immigration law purposes.



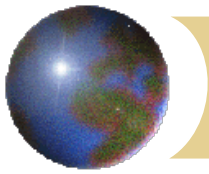
CAN BSO's OPEN & EXAMINE MOBILE DEVICES

- ✚ R.v.Canfield 2020 ABCA 383: Key points from the decision:
- ✚ *R v Simmons*, [1988] 2 SCR 495 being revisited in terms of level of privacy at an airport. The Court identified three levels of constitutional privacy protection in ascending order: 1. routine questioning of every traveller at a POE; 2. a strip/skin search, and 3. body cavity search
- ✚ AB QB erred in not revisiting *Simmons* in light of dramatic changes in tech and Big Data over the past 30 years
- ✚ s. 99(1)(a) does not mention any need to have reasonable grounds or suspicion to conduct a search
- ✚ S. 99(1)(a) of Customs Act ruled unconstitutional insofar as the meaning of "goods" is concerned. 1 yr susp. of declar. Para.111-2
- ✚ Opening of mobile devices or PED's limited
- ✚ Para. 49 discusses crown's concern about keeping cell phones private will hamper their ability to catch smugglers



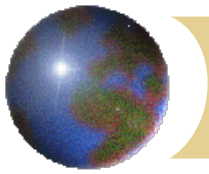
Canfield cont'd

- ✚ Para. 75 – significant intrusion into personal privacy, an approp. Threshold must be met. But the Court left it to Parliament to decide what that threshold should be
- ✚ Rights under s. 8, 10(a), 10(b) and 7 were breached
- ✚ Detention occurs when inquiry moves from “routine questioning” to a more intrusive form of inquiry para. 128
- ✚ S. 24(2) analysis of exclusion of evidence – factors in favour of admission outweighed those factors favouring exclusion
- ✚ Court failed to consider society’s interest in keeping digital information private.
- ✚ Has Crown or Defence sought leave to appeal to SCC?



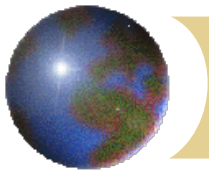
SUMMARY OF KEY POINTS

- ⦿ Where was client born and what citizenship does their father have?
- ⦿ What is their status in Canada?
- ⦿ Hybrid offences are assumed indictable
- ⦿ Know all aspects of P6 and exact charge
- ⦿ 6 mo. Or more can lead to deport
- ⦿ Have new info sworn if pleading to lesser included offence
- ⦿ Youth convictions not relevant Unless raised to adult court
- ⦿ Prov'l statutes irrelevant
- ⦿ Cond'l sentences are not terms of imprisonment
- ⦿ Pre trial detention is included in total sentence



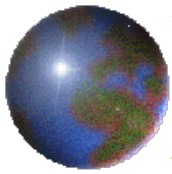
SUMMARY OF KEY POINTS cont'd

- ⊕ Cond'l sentences are not considered terms of imprisonment
- ⊕ Consecutive sentences are not considered by CBSA for section 44 reports
- ⊕ As at Dec. 18/18 impaired driving is considered serious criminality
- ⊕ Re Cit Act: cond'l discharge is not a conviction
- ⊕ Citizenship is not granted to persons on probation
- ⊕ Summary convictions are treated as such wrt Cit Act.



DEFINITIONS

- ✚ IRPA – Immigration Refugee and Protection Act
- ✚ IRPR – Immigration Refugee and Protection Regulations
- ✚ PDI's – Policy Directive Initiatives
- ✚ OM's – Operational Manuals
- ✚ OB's – Operational Bulletins
- ✚ OIC's – Orders in Council such as those associated with the Quarantine Act of Canada – divided into two categories; from USA and from other than USA
- ✚ CBSA – Canada Border Services Agency – Ministry is called: Public Safety and Emergency Preparedness (MPSEA)
- ✚ BSO – Border Service Officer – those who guard our borders
- ✚ IRCC – Immigration, Refugees and Citizenship Canada
- ✚ PFL – procedural fairness letter
- ✚ PED's – personal electronic devices
- ✚ POE – port of entry



THE END – THANK YOU

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