Chapter Eight

Criminal Equivalency

Introduction

There are several provisions in *IRPA* relating to criminality *IRPA* where the issue of equivalency of foreign criminal convictions and offences to Canadian offences arises. If a person is found described in one of the equivalency provisions in subsection 36(1) for "serious criminality" or 36(2) for "criminality" that render them inadmissible to Canada, a removal order may be issued against that person. The relevant removal order in such cases is a deportation order, which must be issued by the Immigration Division (see *Immigration and Refugee Protection Regulations,* s. 229(1)(*c*) and (*d*)).

A permanent resident may be ordered removed from Canada if found described in subsection 36(1) of *IRPA* for "serious criminality". The ground of "criminality" found in subsection 36(2) does not apply to permanent residents. A foreign national, however, may be ordered removed from Canada if found described in subsection 36(1) or 36(2) of *IRPA.*

Certain persons – notably, permanent residents, but also protected persons and foreign nationals who hold a permanent resident visa – have a right of appeal to the Immigration Appeal Division (IAD) from the removal order on both grounds of appeal, that is, that the removal order is not legally valid and that the discretionary jurisdiction of the IAD should be exercised in the appellant's favour (see *IRPA,* s. 63(2) and 63(3)). It is also possible for the Minister to appeal against a decision of the Immigration Division in an inadmissibility hearing (*IRPA,* s. 63(5)), but such appeals occur infrequently.

Relevant Legislation

A person may be inadmissible on the grounds of serious criminality or criminality either because of a conviction for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament *or* for having 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. These grounds of inadmissibility raise issues known as equivalency of foreign offences to Canadian ones.

The relevant provisions of *IRPA* where the issue of equivalency arises with respect to the grounds of serious criminality and criminality can be broken down as follows:[1]

[1] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act*.

- "serious criminality" – foreign conviction for an offence that, if committed in Canada, would constitute a federal offence punishable by a maximum term of imprisonment of 10 years or more – *IRPA*, s. 36(1)(*b*)
- "serious criminality" – committed an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute a federal offence punishable by a maximum term of imprisonment of 10 years or more – *IRPA*, s. 36(1)(*c*)
- "criminality" – foreign conviction for an offence that, if committed in Canada, would constitute a federal indictable offence (punishable by a maximum term of imprisonment of less than 10 years) – *IRPA*, s. 36(2)(*b*)
- "criminality" – committed an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute a federal indictable offence (punishable in Canada by maximum term of imprisonment of less than 10 years) – *IRPA*, s. 36(2)(*c*)
- "criminality" – foreign conviction for two offences not arising out of a single occurrence that, if committed in Canada, would constitute federal (summary conviction) offences – *IRPA*, s. 36(2)(*b*)

To trigger the operation of these grounds of inadmissibility, the equivalent Canadian offence must be punishable "under an Act of Parliament", i.e., one that is found in a federal statute.

Burden and Standard of Proof

As a general proposition, the onus is on the Minister to adduce sufficient evidence to establish the ground of inadmissibility alleged.

The burden of proof relating to admissibility hearings is found in subsection 45(*d*) of *IRPA*, which provides that:

- in the case of a permanent resident or a foreign national who has been authorized to enter Canada, the Immigration Division must make the applicable removal order "if it is satisfied that the foreign national or the permanent resident is inadmissible".
- in the case of a foreign national who has *not* been authorized to enter Canada, the Immigration Division must make the applicable removal order "if it is not satisfied that the foreign national is not inadmissible".

At the IAD, the appellant must establish that they are not inadmissible on the relevant ground of inadmissibility, as determined by the Immigration Division.

Section 33 of *IRPA* provides that inadmissibility under section 36 (as well under sections 34, 35 and 37) includes facts arising from omissions. Unless otherwise provided, inadmissibility may be based on facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur. Paragraph 36(3)(d) provides that a determination of whether a permanent resident has committed an act described in paragraph 36(1)(*c*) must be based on a balance of probabilities.

The meaning of the term "reasonable grounds to believe", which was also found in the former *Immigration Act*, was considered in *Mugesera,*[2] where the Supreme Court of Canada endorsed the following statement of the law:

> [114] The first issue raised by s. 19(1)(*j*) of the *Immigration Act* [i.e., the predecessor of *IRPA*, s. 35(1)(*a*)] is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.) [*Sabour, Mohammad Reza v. M.C.I.* (F.C.T.D., no. IMM-3268-99), Lutfy, October 4, 2000].

The Supreme Court also noted, at para. 116, that the "reasonable grounds to believe" standard applies only to questions of fact, i.e., the findings of fact made by the tribunal.

> When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*,
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> [1994] 1 F.C. 298 (C.A.), at p. 311.

Thus the "reasonable grounds to believe" standard does not apply to conclusions of law. Conclusions of law are reviewed by the Federal Court on the correctness standard.[3]

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[2] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 114; 2005 SCC 40.

[3] Ibid., para. 37.

GENERAL PRINCIPLES

Equating the Foreign Offence to a Canadian Federal Statute

A person may be inadmissible on the ground of serious criminality or criminality because of a conviction for an offence outside Canada or for having committed an act or omission outside Canada that is an offence in the place where it was committed. In the latter case, a conviction need not have been registered nor criminal charges laid in the foreign jurisdiction.

One must then determine whether the offence of which the person was convicted or the act or omission the person committed would, if committed in Canada, constitute an offence that is punishable under Canadian law.[4] The Canadian offence must be found in an Act of Parliament, that is, a federal statute. For the purposes of *IRPA*, indictable offences include "hybrid offences", i.e., offences that may be prosecuted in Canada either summarily or by way of indictment (*IRPA*, s. 36(3)(*a*)).

Determining Equivalency

Equivalencing is the exercise of finding a Canadian offence that is the equivalent of the foreign offence underlying a conviction outside Canada. The principles to be followed when determining equivalency were developed in the context of foreign convictions and are set out in several leading decisions of the Federal Court of Appeal. It is not clear whether these principles apply in relation to foreign offences where there has been no conviction. That matter will be discussed later.

Leading Federal Court Dicta

Brannson v. Canada (Minister of Employment and Immigration), [1981] 2 F.C. 141 (C.A.), at 152-154, 145, per Ryan J.A.:

> Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries.
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> ... where, as here, the definition of the foreign offence is broader than, but could contain, the definition of an offence under a Canadian statute, it may well be

[4] In *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.), Mahoney J.A. stated, at 50:

> On the other side of the coin, as we well know, some countries severely, even savagely, punish offences which we regard as relatively minor. Yet Parliament has made clear that it is the Canadian, not the foreign, standard of the seriousness of crimes, as measured in terms of potential length of sentence, that governs admissibility to Canada. The policy basis for exclusion under paragraph 19(1)(*c*) must surely be the perceived gravity, from a Canadian point of view, of the offence the person has been found to have committed and not the actual consequence of that finding as determined under foreign domestic law.

open to lead evidence of the particulars of the offence of which the person under inquiry was convicted. ... Such particulars might so narrow the scope of the conviction as to bring it within the terms of the Canadian offence.

… the validity or the merits of the conviction is not an issue and the Adjudicator correctly refused to consider representations in regard thereto.

Hill v. Canada (Minister of Employment and Immigration) (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), at 9, per Urie J.A.:

... equivalency can be determined in three ways: first, 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 therefrom the essential ingredients of the respective offences; two, 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 three, by a combination of one and two.

Li v. Canada (Minister of Citizenship and Immigration), [1997] 1 F.C. 235 (C.A.), at 249, 256-258, per Strayer J.A.:

It appears from the jurisprudence that the second way of determining equivalency, as suggested by Urie J.A., is particularly useful where there is insufficient evidence of the legal scope of foreign offence or where it appears that the comparable Canadian offence is narrower than the foreign offence. In such a case it is permissible for the adjudicator to consider evidence as to the acts actually committed by the offender and for which he was convicted abroad. This approved second way also points up the fundamental test of equivalence: would the acts committed abroad and punished there have been punishable here?

A comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences.

What must be compared are the factual and legal criteria for establishing the offence both abroad and in Canada. It is not necessary to compare the adjectival law by which a conviction might or might not be entered in each country. … The [*Immigration*] Act does not contemplate a retrial of the case applying Canadian rules of evidence. Nor does it contemplate an examination of the validity of the conviction abroad. This is so whether the Canadian standards of procedure or evidence sought to be applied are based on the Charter, statute, or common law. … While proceedings in Canada under the *Immigration Act* must no doubt be conducted in accordance with the Charter, it is not inappropriate for Canadian tribunals to recognize and accept the validity of foreign legal systems without measuring them against the Charter. … an adjudicator should not compare the procedural or evidentiary rules of the two jurisdictions, even if the Canadian rules are mandated by the Charter.

Where the Foreign Law is Available

The starting point for equivalency is a comparison of the wording of the foreign and Canadian statutes with a view to determining the "essential elements" or "ingredients" of the respective offences. This also entails a comparison of any "defences" available in each jurisdiction.[5]

The provisions need not be identical, nor is their wording determinative of the issue. While detailed proof of exact equivalency is not required, the essential elements of an offence committed outside Canada must be similar to one known in Canada.

> In general, the essential elements of an offence are those components of an offence usually consisting of the *actus reus* and *mens rea*, which must be proven for a finding of guilt.[6]

One cannot assume the equivalence to an alleged foreign offence of which the essential elements are not known..[7]

It might be in a given case that a number of Canadian provisions are found to be equivalent. There is no legal requirement to find the equivalent that is "most similar" and make the decision with respect to that provision only.[8]

If the essential elements correspond or *are equivalent in all relevant respects* to those of the Canadian offence, or *if the foreign offence is "narrower" than the Canadian offence*,[9] then it is possible to make a finding of equivalency unless the person can argue

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5 *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (C.A.), at 258.

6 *Popic, Bojan v. M.C.I.* (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000. The Court held that the visa officer erred by importing into the analysis considerations which are not relevant to a determination of the essential elements of the offence of "false pretences" or "fraud", namely that like all residents of Germany, the applicant knew he must pay for public transit and that being caught three times is quite exceptional.

7 In *Maleki, Mohammed Reza v. M.C.I.* (F.C.T.D., no. IMM-570-99), Linden, July 29, 1999. Reported: *Maleki v. Canada (Minister of Citizenship and Immigration)* (1999) 2 Imm. L.R. (3d) 272 (F.C.T.D.), the applicant had been convicted of entering Greece illegally. His DROC refusal letter stated that this offence, if committed in Canada, would constitute an offence under section 94 of the *Immigration Act* and that the applicant would be inadmissible under paragraph 19(2)(*a.1*) of the *Immigration Act*. The text or an adequate description of the relevant Greek statute was not provided to the immigration officer or to the Court. On the evidence available, there were no reasonable grounds on which to decide that there was equivalence in the Canadian and Greek offences.

8 *M.C.I. v. Brar, Pinder Singh* (F.C.T.D., no. IMM-6318-98), Campbell, November 23, 1999.

9 In *Lam, Chun Wai v. M.E.I.* (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 14, 1995, the Court held that since the scope of the crime of extortion in Canada was wider than the Hong Kong provision dealing with blackmail, it was not necessary for the adjudicator to go beyond the wording of the

that there are relevant defences available with respect to the offence in Canada which were not available in the foreign jurisdiction. Although the elements of the Canadian offence must include within them the elements of the foreign offence, they need not be identical.

Where the foreign offence is "broader" than the Canadian offence, it may still be possible to make a finding of equivalency if, based on the evidence, the facts as proven establish that all of the elements of the Canadian offence were contained in the acts committed by the person. In other words, evidence can be adduced that the actual activity for which the person was convicted abroad falls within the scope of the Canadian offence. Where such evidence is not adduced or available, it may not be possible to establish equivalency.[10]

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statute in order to determine whether the essential elements of the offence in Canada had been proven in the foreign proceedings.

[10] In *Brannson v. Canada (Minister of Employment and Immigration*, [1981] 2 F.C. 141 (C.A.), the proposed Canadian equivalent related to mailing letters and circulars, whereas the U.S. offence was broader and referred to mailing any matter or thing whatever (for the purpose of executing a scheme to defraud). In other words, a person could be convicted of the U.S. offence in question even if the materials transmitted or delivered were neither letters nor circulars. No evidence was introduced at the inquiry, however, as to what the applicant had mailed.

In *Hill, Errol Stanley v. M.E.I.* (F.C.A., no. A-514-86), Hugessen, Urie, MacGuigan, January 29, 1987. Reported: *Hill* v. *Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), the definition of theft as it pertains in the Texas statute was not produced before the adjudicator; the Court could not conclude that Texas law included the important additional requirement that the taking be "without colour of right", which was an essential ingredient of the offence of theft in Canada. Therefore, equivalency had not been established. The Court also noted that, although it might have been possible to adduce evidence confirming that the applicant did not have a factual foundation for a colour of right defence, there was no evidence adduced before the adjudicator to allow for this analysis and hence there could be no finding of equivalency.

In *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 487 (C.A.), the Oklahoma offence of first-degree arson did not make reference to a "colour of right" defence and it was found to be wider in scope than subsection 389(1) of the *Criminal Code*, as it encompassed the burning of property through negligence or inadvertence, which is covered by section 392 of the *Code*. On the meagre facts established by the record, however, it was impossible to determine which Canadian provision was the applicable one, and thus equivalency had not been established. See also *Lei, Alberto* v. *S.G.C.* (F.C.T.D., no. IMM-5249-93), Nadon, February 21, 1994. Reported: *Lei* v. *Canada (Solicitor General)* (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.), where, since the U.S. offence of reckless driving was wider than the Canadian offence, without evidence as to the circumstances which resulted in the charge in the state of Washington, no finding of equivalency could be made.

In *Li, supra,* footnote 5, the Court determined that the Canadian offence under paragraph 426(1)(*a*) of the *Criminal Code* was much narrower than section 9 of the Hong Kong *Prevention of Bribery Ordinance* in view of the rather restrictive interpretation given to "corruptly" by the Supreme Court of Canada. While it may have been possible to demonstrate through particulars of the Hong Kong charges, or from the evidence from the trial there, that in fact what the appellant did would also constitute an offence within the Canadian provision, such evidence was not led before the adjudicator.

No equivalency exists where the foreign offence is "broader" and the particulars of the offence committed would not bring the offence within the description of the Canadian offence, i.e., the person's actions would not render them culpable in Canada.

Similarly, if there is no equivalency of defences and the defences available in Canada are "broader" than those available in a foreign jurisdiction, this could result in a finding that there is no equivalency.[11] It would still be open to the Minister to establish, based upon an analysis of the particular facts which gave rise to the conviction in the foreign jurisdiction, that the person would not have been able to raise the broader Canadian defence. However, in the absence of such evidence and given the existence of broader defences in Canada, equivalency cannot be established.

A consideration of the Canadian and foreign statutes could also entail a consideration of how a particular provision has been interpreted in the respective jurisprudence.[12] However, the procedural or evidentiary rules of the two jurisdictions, including the matter of burden of proof, should not be compared, even if the Canadian rules are mandated by the *Canadian Charter of Rights and Freedoms*. The issue to be resolved in any equivalencing case is not whether the person would have been convicted in Canada, but whether there is a Canadian equivalent for the offence of which the person was convicted outside Canada.

There is no obligation to consider the constitutionality of foreign criminal law. It is not inappropriate for Canadian tribunals to recognize and accept the validity of foreign legal systems without measuring them against the Charter.[13]

While it is not mandatory for the Minister to present evidence of the criminal statutes of the foreign state, proof of foreign law ought to be made if the foreign statutory provisions exist.[14]

Steps in Analysis

For foreign convictions, where the foreign law is available:

1. Has the person been convicted of an offence outside Canada?

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11 *Li, supra,* footnote 5.

12 In *Masasi, Abdullai Iddi v. M.C.I.* (F.C.T.D., no. IMM-1856-97), Cullen, October 23, 1997. Reported: *Masasi v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 133 (F.C.T.D.), the Court determined that the adjudicator erred by not addressing the meaning in Canadian and U.S. law of the term "bodily harm", which was found to be an essential element of the offence under consideration (assault). The Court stated: "Clearly, a mere comparison of the words of the two provisions, without examining the legal content of those words, is insufficient in determining equivalency …".

13 In *Li, supra,* footnote 5, the Court rejected the appellant's argument that because the Hong Kong ordinance placed the burden of proving the defence of lawful authority or reasonable excuse on the accused, it offends subsection 11(*d*) of the *Canadian Charter of Rights and Freedoms* (i.e., the presumption of innocence).

14 *Dayan v. Canada (Minister of Employment and Immigration),* [1987] 2 F.C. 569 (C.A.).

2. What are the essential elements or ingredients of the foreign offence?

3. What are the essential elements or ingredients of the suggested Canadian equivalent offence?

4. Are these same elements present in the Canadian offence as in the foreign offence?

- If the essential elements or ingredients correspond in all relevant respects to those of the Canadian offence, there is equivalency – subject to possible defences (see below).

5. If the elements of the foreign and Canadian offences do not correspond:

(a) Is the Canadian offence *broader* than the foreign offence?

- If the elements of the foreign offence are contained within the scope of the Canadian offence, there is equivalency – subject to possible defences (see below).

(b) Is the Canadian offence *narrower* than the foreign offence?

- For equivalency, there must be evidence of the particulars of the foreign offence such that the conduct for which the person was convicted falls within the scope of the Canadian offence.

6. Are there any defences available in relation to either the foreign or Canadian offence?

- If the elements, including defences, of the foreign offence correspond to those of the Canadian offence, there is equivalency.

- If there are relevant defences available in the foreign jurisdiction that are not available under Canadian law, there is equivalency as the Canadian offence is broader than the foreign offence.

- If there are relevant defences under Canadian law that are not available in the foreign jurisdiction, there is no equivalency, unless there is evidence, based on the particular facts which gave rise to the foreign conviction, that the person would not have been able to raise the broader Canadian defence.

Where the Foreign Law Is Not Available

Where there is no evidence of the foreign law, evidence can be adduced as to the factual foundation for the conviction. That evidence will then be examined to determine whether the essential elements or ingredients of the Canadian offence as described in Canada had been proven in the foreign proceedings to secure a conviction or were otherwise established on the facts.[15] In such cases, there must be sufficient evidence before the decision-maker to establish the equivalency of the foreign offence to the Canadian one.[16]

Steps in Analysis

For convictions, where the foreign law is not available:

1. What conduct did the foreign court find that the person engaged in to support the conviction?

2. Is that same conduct punishable under Canadian law?

Malum in se Offences

Where the foreign offence falls within a category referred to as *malum in se,*[17] a strict comparison of all of the elements or ingredients may not be necessary.[18]

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[15] In *Hill, supra,* footnote 10, the Court recognized the possibility of establishing equivalency either by analyzing the essential elements or, in the alternative, by adducing evidence as to the factual foundation for the conviction.

[16] See, for example, *Moore, Terry Joseph v. M.E.I.* (F.C.A., no. A-501-88), Heald, Hugessen, Desjardins, January 31, 1989, where there was no evidence as to the relevant wording of the U.S. statute and no direct evidence or material from which it could be inferred that the applicant knew that the cheque in his possession had been stolen from the mail. The Court held that the decision in *Taubler v. Canada (Minister of Employment and Immigration),* [1981] 1 F.C. 620 (C.A.) did not support the proposition that the element of specific knowledge required by paragraph 314(1)(*b*) of the *Criminal Code* can be presumed in the absence of any evidence whatsoever. (In *Taubler,* the Court had held that, in the absence of evidence to the contrary, it was presumed that the Austrian law of misappropriation involved the element of *mens rea* and that a conviction under that law indicated that a finding of guilty intent had been made.) See also *Anderson v. Canada (Minister of Employment and Immigration),* [1981] 2 F.C. 30 (C.A.), where it was impossible, based on the scant evidence presented, to define the U.S. offence (grand larceny or attempted grand larceny in the third degree) with any precision and thus determine equivalency.

[17] The legal concept of *malum in se* is defined in *Black's Law Dictionary* (6th edition) as follows (in part):

An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.

[18] This exception was referred to in *Button v. Canada (Minister of Manpower and Immigration),* [1975] F.C. 277 (C.A.), at 284, and in *Brannson, supra,* footnote 10, at 144. In *Button,* the Court stated: "... in our view,

The Federal Court of Appeal in *Dayan*,[19] cautioned, however, that

> ... proof of statutory provisions of the law of Israel ought to have been made in this case if such statutory provisions exist. Alternatively, the absence of such provisions in the statute law of that country, if that is the fact, ought to have been established. Reliance on the concept of offences as malum in se to prove equivalency with provisions of our Criminal Code, is a device which should be resorted to by immigration authorities only when for very good reason, established to the Adjudicator's satisfaction, proof of foreign law has been difficult to make and then only when the foreign law is that of a non-common law country. It is a concept to which resort need not be had in the case of common law countries. If it were not for the overwhelming evidence of the applicant's conviction in this case for an offence known to our law [i.e., robbery], I would not have hesitated to grant the application.

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there can be no presumption that the law of a foreign country coincides with a Canadian statute creating a statutory offence, except where the offence falls within one of the traditional offences commonly referred to as *malum in se*." This principle was applied by the Federal Court in *Clarke, Derek v. M.E.I.* (F.C.A., no A-588-84), Thurlow, Hugessen, Cowan, October 31, 1984 in relation to assault and robbery. It was also applied by the adjudicator in *Dayan, supra,* footnote 14 , where no evidence was tendered of the criminal statutes of Israel. The adjudicator determined that the applicant had been convicted in Israel of robbery and that robbery is basically theft with violence and fell within the *malum in se* exception. The Court, at 576-577, endorsed a more sophisticated analysis:

In this case, there was evidence ... that the applicant had been convicted in Israel of either or both of the offences of armed robbery and of robbery. ... at least in common law jurisdictions, they are crimes. We were informed that Israel is a country the system of justice of which is based on the common law ... The essence of the offence of robbery at common law was stealing whether or not such stealing was accompanied by violence, threats of violence or the use of a weapon in its commission. It is a crime because it is an offence which is contrary to society's norms as is reflected in the common law. A statute may codify it simply as such or it may, in the codification, include other ingredients requiring proof before a conviction can be obtained. Theft as described in paragraph 283(1)(a) of the *Code*, is an example of a codification which includes the ingredients requiring proof of taking "fraudulently and without colour of right". ...

We do know ... that the crime of robbery at common law has an essential ingredient "stealing" which the specific statute in Canada, section 302 of the *Code*, also has as its essential ingredient. By definition (section 2 of the *Code*) "steal" means to commit theft. Therefore, by virtue of section 283, the taking must be fraudulent and without colour of right. The transcripts of evidence in the record in this case establish beyond doubt ... that the applicant was a party to a theft of money to which none of the participants had any colour of right and the stealing of which was unlawful as the list of criminal convictions discloses. In all the circumstances, particularly since a weapon was used, it is hard to conceive that a plea of colour of right could succeed. Having accepted all of the evidence including the fact that the applicant had been convicted of robbery in Israel and that a weapon had been used in the commission of the offence, it follows that the Adjudicator was entitled to conclude that he had been convicted of an offence punishable under section 302 of the *Code*.

However, in *Hill, supra,* footnote 10, the Court stated, at 5: "Theft, however, is an offence whose essential elements are not self-evident."

[19] *Dayan, supra,* footnote 14, at 578.

Committing an Offence Outside Canada

The wording of paragraphs 36(1)(c) and 36(2)(*c*) of *IRPA* is different from that found in paragraphs 36(1)(*b*) and 36(2)(*b*), in that the former provisions do not state that the offence for which the person could be punishable in the foreign jurisdiction must constitute an offence in Canada. Rather they provide that the act or omission must constitute an offence in the foreign jurisdiction, and one in Canada. In other words, it appears that there is no requirement that the foreign and Canadian offences must be compared and found to be equivalent,[20] though this issue is not clearly settled in the jurisprudence.

Another difference is that paragraphs 36(1)(*b*) and 36(2)(*b*) apply in cases where there is a conviction outside Canada, whereas paragraphs 36(1)(*c*) and 36(2)(*c*) apply where it is alleged that the person has committed an offence abroad. The latter provision has been relied on in cases where a person has fled justice after being charged but before being tried or where a person has never been charged in the jurisdiction where the offence was committed. It is not clear whether paragraphs 36(1)(*c*) and 36(2)(*c*) were intended to apply to persons who have been convicted of an offence committed in the foreign jurisdiction or who were tried in that jurisdiction but the court chose not to enter a conviction. The Immigration Division has applied the provision in the former case,[21] and the Federal Court appears to have accepted that it can apply in the latter case.[22]

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[20] This approach was taken by the adjudicator in *M.C.I. v. Legault, Alexander Henri* (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: *Canada (Minister of Citizenship and Immigration) v. Legault* (1997), 42 Imm. L.R. (2d) 192 (F.C.A), where the Court set out the adjudicator's analysis without considering whether it was the correct interpretation of the *Immigration Act*. Leave to appeal to the Supreme Court of Canada was refused March 12, 1998. For a more explicit statement on the "double criminality" requirement, see *Zeon, Kyong-U v. M.C.I.* (F.C., no. IMM-7766-04), Campbell, September 29, 2005; 2005 FC 1338. In *Mugesera, supra*, footnote 2, at para. 59, the Supreme Court held that, where the Minister relies on a crime committed abroad (with which the person was charged in Rwanda), a conclusion that the elements of the crime in Canadian criminal law have been made out will be deemed determinative in respect of the commission of crimes under Rwandan criminal law, adding that "No one challenges the fact that the constituent elements of the crimes are basically the same in both legal systems." However, in *Pardhan, Wazir Ali v. M.C.I.* (F.C., no. IMM-936-06), Blanchard, July 20, 2007; 2007 FC 756 and *Timis, Ionita v. M.C.I.* (F.C., no. IMM-1446-07), Blanchard, December 12, 2007; 2007 FC 1303, the Court suggested that the essential elements of the foreign and Canadian offences must be compared to ascertain whether or not the evidence adduced was sufficient to establish equivalency.

[21] In *Timis, supra*, footnote 20, the applicant was convicted *in absentia* yet the Minister proceeded under paragraph 36(1)(*c*); the decision was overturned on other grounds. In *M.P.S.E.P v. Watson, Malcolm* (ID A6-00450), Lasowski, December 18, 2006 (reasons signed January 22, 2007) (*RefLex* Issue 304), the subject of the admissibility hearing was convicted in New York State of the offences of sexual abuse in the third degree and endangering the welfare of a child. The Immigration Division found that the offence of sexual abuse in the third degree is equivalent to the offence of sexual exploitation under section 153 of the Canadian *Criminal Code*. The foreign offence is broader than the Canadian offence, as the latter contains the essential element that the accused be in a position of trust or authority towards the victim. Since the subject of the proceeding was the victim's ninth grade English teacher, he was in a position of trust with respect to the victim. He was therefore found to be a person described in section 36(1)(*b*) of *IRPA.* He was also found to be described in section 36(1)(*c*) of the Act based on the same facts.

[22] In *Magtibay, Brigida Cherly v. M.C.I.* (F.C., no. IMM-2701-04), Blais, March 24, 2005; 2005 FC 397, the Court in the Philippines found that although the applicant's spouse had committed an offence, since the

Steps in Analysis

Where a foreign "commission" is alleged:

1. What conduct did the evidence establish that the person engaged in outside Canada?

2. Was it punishable in the foreign jurisdiction?

3. Is that same conduct punishable under Canadian law?

EVIDENTIARY MATTERS

Foreign Convictions

The Federal Court of Appeal has held that the validity of a foreign conviction on the merits cannot be put in issue.[23]

As stated in *Ward,*[24] the issue is not whether the applicant would have been convicted if the entire facts had been revealed at the trial abroad, or whether he would have been convicted in Canada on those facts; rather the issue is whether there are reasonable grounds to believe, based on the facts at trial and the admissions of the applicant, that the foreign conviction is equivalent to one in Canadian law. Moreover, the Court also rejected the applicant's argument that his offence was political in nature and should not, therefore, be considered.[25]

However, in one decision, the Federal Court held that the adjudicator was required to consider the applicant's allegation that the statements he made to the police that resulted in his conviction in India were given under torture.[26]

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victim pardoned her aggressor, no conviction resulted. An immigration officer found the offence equivalent to sexual assault in Canada and gave no effect to the pardon. The Court held that the immigration officer was correct in not giving effect to the pardon and finding inadmissibility under s. 36(1)(*c*) of *IRPA,* since there was no need to prove a conviction; rather, certain acts must have been committed that render the person inadmissible.

23 *Brannson, supra,* footnote 10, at 145; *Li, supra,* footnote 5, at 256.

24 *Ward, Patrick Francis v. M.C.I.* (F.C.T.D., no. IMM-504-96), Heald, December 19, 1996. Reported: *Ward v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 102 (F.C.T.D.). Thus the Court rejected the applicant's argument that he had been coerced into pleading guilty in order to protect his wife and children.

25 *Ward,* ibid., at 10. The Court held: "It has never been the case in Canadian criminal law that, because someone had a particular motive in committing a crime, he or she lacked the intention to commit the act. The applicant in the case at bar, while he may have been motivated to take hostages for political reasons, nonetheless still had the intention to take hostages."

26 *Sian, Jasvir Singh v. M.C.I.* (F.C., no. IMM-1673-02), O'Keefe, September 3, 2003; 2003 FC 1022.

The Federal Court of Appeal has held that a conviction *in absentia* is a conviction.[27] Foreign dispositions in criminal matters may take forms unknown under Canadian law and their effect will have to be determined by the IAD.[28]

If the Canadian offence used for equivalencing is unconstitutional then there can be no equivalent Canadian offence.[29] However, the fact that a foreign conviction is subsidiary to one whose Canadian equivalent has been declared unconstitutional does not extinguish the foreign conviction nor the subsidiary offence (jumping bail) in either country.[30]

Lack of a certificate of conviction, while it leaves something to be desired in the particularity of the evidence, can be overcome by other evidence.[31] The Immigration Appeal Board held that a letter from the Jamaica Constabulary indicating that their records show a conviction was *prima facie* evidence of inadmissibility.[32]

Where value is one of the elements of an offence, the decision-maker should ensure that evidence is adduced as to the respective exchange values on the date of the commission of the offence with which the person is charged abroad before determining the equivalency of the foreign law for such offence with the Canadian law.[33]

The use of the word "convicted" means a conviction that has not been expunged.[34] Paragraph 36(3)(*b*) provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which there has been a final determination of acquittal, for example, on appeal to a higher court. Thus, a

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27 *Arnow, Leon Maurice v. M.E.I.* (F.C.A., no. A-599-80), Heald, Ryan, MacKay, September 28, 1981. Leave to appeal to the Supreme Court of Canada was refused, [1982] 2 S.C.R. 603.

28 See, for example, *Drake, Michael Lawrence v. M.C.I.* (F.C.T.D., no. IMM-4050-98), Tremblay-Lamer, March 11, 1999. Reported: *Drake v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 218 (F.C.T.D.), which considered the effect of an "Alford plea" (i.e., a plea bargain, not a confession) in the State of Washington. See also *Sicuro, Fortunato v. M.C.I.* (F.C., no. IMM-695-02), Mosley, March 25, 2004; 2004 FC 461, where the Court considered the effect of the Italian "patteggiamento" process, a form of plea bargain whereby the applicant had agreed to an implied plea of guilty.

29 *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.). The applicant had been convicted in New York State of sodomy. The Court held that the Canadian equivalent—section 159 of the *Criminal Code* (prohibiting anal intercourse with persons under 18)—violated sections 7 and 15 of the *Charter*. In *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996, the Court stated that the IAD does not have the jurisdiction to rule on the constitutionality of any legislation other than the *Immigration Act* (since replaced by *IRPA*). Challenges to the constitutionality of other federal legislation, as it may arise in an appeal before the IAD, must be brought in another forum.

30 *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (T.D.), at 580-582.

31 *Singleton, George Bruce v. M.E.I.* (F.C.A., no. A-813-83), Thurlow, Mahoney, Stone, November 7, 1983.

32 *Cameron, Beverley Mae v. M.E.I.* (I.A.B. V83-6504), D. Davey, Hlady, Voorhees, September 11, 1984, at 2.

33 *Davis, Kent Douglas* v. *M.E.I.* (F.C.A., no. A-81-86), Urie, Hugessen, MacGuigan, June 19, 1986.

34 *Burgon, supra,* footnote 4.

person may no longer be inadmissible at the time of their hearing before the IAD where their conviction has been overturned on appeal.

Where no issue of an appeal of a conviction is raised at the hearing, the member is entitled to rely on the evidence adduced by the parties. There is no duty to conduct a further inquiry beyond the evidence before the member.[35]

The words "not arising out of a single occurrence" found in paragraph 36(2)(*b*) were interpreted in two Federal Court cases decided in relation to a similarly worded provision under the *Immigration Act.* It was held that an "occurrence" is synonymous with the terms "event" and "incident" and not with "a course of events". Therefore, summary conviction offences which were committed on different dates arose out of different occurrences rather than a single occurrence.[36]

Committing an Offence Outside Canada

While documents such as a foreign police report, arrest warrant, indictment or pre-sentence report can be taken into account, the decision-maker must make an independent evaluation of the evidence presented at the hearing and not simply rely on those documents.

In *Legault*, the Federal Court–Trial Division held that the contents a U.S. federal grand jury indictment and the ensuing arrest warrant, on which the adjudicator relied, did not constitute evidence of the commission of alleged criminal offences.[37] The Federal Court of Appeal overturned this decision and determined that the indictment and warrant for arrest were appropriate pieces of evidence to consider.[38]

In *Kiani*,[39] the adjudicator received in evidence a police report indicating that the applicant had participated in a violent demonstration in Pakistan and had been charged

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35 *Soriano, Teodore v. M.C.I.* (F.C.T.D., no. IMM-2335-99), MacKay, August 29, 2000.

36 *Alouache, Samir v. M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.). Affirmed on other grounds by *Alouache, Samir v. M.C.I.* (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996. In this case, the applicant was convicted of three offences that occurred on different dates. The applicant argued that these convictions arose out of a single occurrence, namely a marital dispute. The Court did not accept this argument as the breakdown of the applicant's marriage was "a course of events" and not a single occurrence. Compare with *Libby, Tena Dianna v. M.E.I.* (F.C.A., no. A-1013-87), Urie, Rouleau, McQuaid, March 18, 1988. Reported: *Libby v. Canada (Minister of Employment and Immigration)* (1988), 50 D.L.R. (4th) 573 (F.C.A.), where the Court held that the applicant's original charge of theft and his failure to report for fingerprinting in connection with that charge arose out of the same occurrence.

37 *Legault, Alexander Henri v. S.S.C.* (F.C.T.D., no. IMM-7485-93), McGillis, January 17, 1995. Reported: *Legault v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).

38 *Legault* (F.C.A.), *supra,* footnote 20.

39 *Kiani, Raja Ishtiaq Asghar v. M.C.I.* (F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995. Reported: *Kiani v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 269 (F.C.T.D.).

with criminal offences as a result. The applicant acknowledged his participation and claimed he had lost a leg as a result of a gunshot wound. The Federal Court–Trial Division held that the adjudicator had sufficient evidence on which to reasonably conclude that the applicant's testimony that he was not guilty of the charges was neither credible nor trustworthy. Moreover, the adjudicator had made an independent determination on the basis of the evidence before him and did not simply rely on the police report. In upholding the Trial Division decision in *Kiani*, the Federal Court of Appeal[40] commented that the facts before the adjudicator in this case were more extensive than in *Legault*, and noted that, in any event, the Court of Appeal had reversed the Trial Division decision in *Legault*.

In *Ali*,[41] the Court held that the majority of IAD erred in appearing to consider there to be a burden on the applicant to establish his version of the events, including the self-defence argument. The burden of proof rested with the Minister, including the burden to disprove self-defence. The majority also erred in speculating, in the face of a lack of expert evidence, regarding whether the fatal wound was inflicted accidentally or intentionally.

In *Bertold,*[42] the Court held that the IAD erred in admitting into records relating to outstanding charges in Germany, as they were obtained contrary to the laws of Germany, and thus their admission would thus contravene sections 7 and 8 of the *Canadian Charter of Rights and Freedoms.*

Section 133 of *IRPA* provides that, pending the disposition of their claim or if refugee protection is conferred, a refugee claimant who came into Canada directly or indirectly from the country in respect of which the claim is made, cannot be charged under *IRPA* or the *Criminal Code* for using false documents or misrepresentation in relation to coming into Canada. The Federal Court–Trial Division has held that, where a Convention refugee uses a false passport to come to Canada, that would not give rise to inadmissibility.[43] In another case, the Federal Court held that the reprieve covers only fraudulent documents obtained for the purpose of entering Canada, and does not extend to the use of other fraudulent documents.[44]

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40 *Kiani, Raja Ishtiaq Asghar v. M.C.I.* (F.C.A., no. A-372-95), Isaac, Linden, Sexton, October 22, 1998.

41 *Ali, Abdi Rahim v. M.C.I.* (F.C.T.D., no. IMM-2993-99), Gibson, July 20, 2000.

42 *Bertold, Eberhard v. M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999. Reported: *Bertold v. Canada (Minister of Minister of Citizenship and Immigration)* (1999), 2 Imm. L.R. (3d) 46 (F.C.T.D.).

43 In *Vijayakumar, Nagaluxmy v. M.C.I.* (F.C.T.D., no. IMM-4071-94), Jerome, April 16, 1996. Reported: *Vijayakumar v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 176 (F.C.T.D.), the Court held that since the applicant's (sponsored) husband used a false passport to get out of Sri Lanka unharmed, not to defraud immigration officials, he had not committed an offence as contemplated by subparagraph 19.1(*c.1*)(ii) of the *Immigration Act*.

44 *Uppal, Harminder Singh v. M.C.I.* (F.C., no. IMM-2663-05), Layden-Stevenson, March 15, 2006; 2006 FC 338.

Relevant Time for Determining Inadmissibility

The facts at the time of the offence must be assessed based on the Canadian law as it reads at the time of the admissibility hearing or appeal to the IAD. Thus a person may no longer be inadmissible as a result of changes to the *Criminal Code* occurring after their criminal conviction.

In *Robertson*[45] the applicant was ordered deported pursuant to paragraph 19(1)(*c*) of the *Immigration Act* based on a 1971 conviction of possession of stolen property valued at more than $50, an offence which carried a maximum of 10 years' imprisonment. However, the *Criminal Code* was subsequently amended such that that penalty applied to stolen goods exceeding $200, which amendment was in force at the time of the inquiry in 1978. (According to the evidence, the retail value of the stolen property in question did not exceed $150, and the wholesale value was approximately $45 to $60; thus the maximum punishment at the time would have been imprisonment for two years.) In setting aside the deportation order, the Federal Court of Appeal stated:

> In my opinion, 19(1)(c) can only be used to deport a person where that person has been convicted of an offence for which the maximum punishment at the date of the deportation order is ten years. The word "constitutes" in the present tense supports this view.

Conversely, a person may not have been inadmissible at the time of their conviction, but has become so as a result of a subsequent amendment to the *Criminal Code*.

In *Ward*,[46] at the time of the applicant's conviction in Ireland of the offence of false imprisonment, the Canadian equivalent offence, namely forcible confinement, carried a term of imprisonment of five years, whereas at the date of the deportation order, the offence provided for a term of imprisonment not exceeding 10 years. The Federal Court–Trial Division held that there was no reason to distinguish the principle enunciated in *Robertson*, and that the adjudicator had not erred in considering the (more severe) punishment for the offence as of the date of the deportation order.

The Federal Court–Trial Division has held that an amendment to the *Immigration Act* could render someone inadmissible based on an earlier conviction that would not

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[45] *Robertson v. Canada (Minister of Employment and Immigration)*, [1979] 1 F.C. 197 (C.A.). See also *Weso, Mohamed Omar v. M.C.I.* (F.C.T.D., no. IMM-516-97), Cullen, April 21, 1998.

[46] *Ward, supra*, footnote 24. In the related Immigration Appeal Board decision of *Reyes v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 148 (I.A.B.), there was the added complication that the foreign offence was not equivalent to an indictable offence in Canada at the time the application for permanent residence was filed, but became one prior to the conclusion of the processing of the application. The Board held that such an offence could not bring the applicant within the ambit of section 19 and that the visa officer could not apply amendments to the *Criminal Code* enacted after the filing of the application to the detriment of the applicant.

have attracted inadmissibility before the amendment.[47] However, an amendment to *Immigration Act* between the time of the admissibility hearing (at which a removal order was issued) and the time the appeal was heard, was held not to accrue to the benefit of the person, who would no longer have been inadmissible as a result of the amendment. The Federal Court of Appeal stated that unless Parliament has clearly indicated otherwise, the correctness of the adjudicator's decision must be measured by the law in force at the time of the decision.[48]

Section 44 Report as a Limiting Factor

The report must specify the offence committed outside Canada and the equivalent offence under an Act of Parliament.[49] However, it is not a requirement that "the specific facts must be precisely as alleged in the report providing the requirements of natural justice are complied with."[50]

The Federal Court of Appeal has held that an adjudicator is not bound to consider only the putative Canadian equivalent(s) set out in the report. The adjudicator may consider other Canadian equivalents if the appropriate equivalent leads to the person being described in the provision of the *Immigration Act* cited in the report.[51]

In *Uppal,* the Federal Court held that there is nothing in *IRPA,* the Regulations or the *Immigration Division Rules* to suggest that a section 44 report cannot be amended. Substituting a different Canadian equivalent offence does not require that the report be returned to the Minister for a fresh determination where the substitution conforms to the description of the act in question.[52]

In *Drake,*[53] the applicant had been convicted *in absentia,* in 1992, in the State of Washington of child molestation. In 1993, an adjudicator made a deportation order for subparagraph 27(1)(*a.1*)(i) of the *Immigration Act,* and did not rule on the subparagraph 27(1)(*a.1*)(ii) allegation. In 1994, a U.S. judge vacated the *in absentia* conviction and the applicant pleaded guilty to the charges on which the earlier conviction had been based.

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47 *Kanes, Chellapah v. M.E.I.* (F.C.T.D., no. IMM-1918-93), Cullen, December 14, 1993. Reported: *Kanes v. Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 223 (F.C.T.D.); *Cortez, Rigoberto Corea v. S.S.C.* (F.C.T.D., no. IMM-2548-93), Rouleau, January 26, 1994. Reported: *Cortez v. Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 270 (F.C.T.D.).

48 *Bubla v. Canada (Solicitor General),* [1995] 2 F.C. 680 (C.A.).

49 *Timis, supra,* footnote 20.

50 *Eggen v. Canada (Minister of Manpower and Immigration),* [1976] 1 F.C. 643 (C.A.), at 645. See also *Canada (Minister of Manpower and Immigration) v. Brooks,* [1974] S.C.R. 850, at 854-55. In *Villanueva Perez, Eduardo v. M.C.I.* (F.C., no. IMM-2398-06), Phelan, November 27, 2006; 3006 FC 1434, the Court found that the report was sufficiently unclear such that the applicant did not have proper notice of the issues required to be addressed.

51 *Clarke, supra,* footnote 18.

52 *Uppal, supra,* footnote 44.

53 *Drake, supra,* footnote 28.

The appeal before the IAD was postponed from 1994 until 1998. The IAD quashed the deportation order based on subparagraph 27(1)(*a.1*)(i), but made a new deportation order based on subparagraph 27(1)(*a.1*)(ii), which allegations had never been abandoned. The Federal Court–Trial Division did not accept the applicant's main submission that he had not been properly informed of the nature of the proceedings before the IAD.

Discharges and Pardons

Foreign discharges or pardons are not necessarily recognized in Canada. The legislation providing for the expunging of a conviction should be accorded respect where the laws and the legal system are similar to Canada's.[54] The Federal Court of Appeal in *Saini*,[55] endorsed the following statement of the law with respect to the effect to be given to a foreign discharge or pardon:

> [24] To summarize, our jurisprudence requires that 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 be no valid reason not to recognize the effect of the foreign law.

The Court also held that in the absence of evidence as to the motivating considerations which led to the grant of a pardon by another state jurisdiction, the Board is not bound by the pardon. The principles in *Saini* continue to be applied under *IRPA.* This topic is discussed in more detail below.

Effect of a Discharge

In *Fenner*,[56] the respondent was given a deferred sentence after a conviction in the State of Washington of the offence of "negligent homicide by means of a motor vehicle". This meant that at the end of a period of probation he could request the opportunity to withdraw his guilty plea and have the charge dismissed, which is, in fact, what occurred. The Immigration Appeal Board decided that this procedure, unknown to Canadian law, was not equivalent to an absolute or conditional discharge and that the conviction in the first instance remained part of the applicant's record.

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54 *Burgon*, *supra,* footnote 4.

55 *Canada (Minister of Citizenship and Immigration) v. Saini*, [2002] 1 F.C. 200 (F.C.A.). The Court also held that the crime in question, hijacking, is so serious that it provided a solid rationale to depart from the principle that a pardon granted by another jurisdiction, whose laws are based on a similar foundation as in Canada, should be recognized in Canada.

56 *M.E.I. v. Fenner, Charles David* (I.A.B. V81-6126), Campbell, Tremblay, Hlady, December 11, 1981.

Effect of a Pardon

The granting of a pardon in another country does not necessarily render the person concerned admissible to Canada. The Federal Court of Appeal considered the effect of a pardon in a foreign jurisdiction in *Burgon*.[57] The Court concluded that in using the word "convicted" in the inadmissibility provisions, Parliament meant a conviction that has not been expunged pursuant to any other legislation it had enacted. The Court further held that when the laws and legal system of the foreign country are substantially similar to those of Canada in purpose, content and result, effect should be given to a foreign pardon unless there is good reason not to do so.

> The further question to consider is whether the U.K. legislation, which is similar in purpose, but not identical to the Canadian law, should be treated in the same way. In both countries, certain offenders are granted the advantage of avoiding the stigma of a criminal record so as to facilitate their rehabilitation. There is no good reason for Canadian immigration law to thwart the goal of this British legislation, which is consistent with the Canadian law. Our two legal systems are based on similar foundations and share similar values. …
>
> Unless there is some valid basis for deciding otherwise, therefore, the legislation of countries similar to ours, especially when their aims are identical, ought to be accorded respect. While I certainly agree with Justice Bora Laskin that the law of another country cannot be "controlling in relation to an inquiry about criminal convictions to determine whether immigration to Canada should be permitted" (see Minister of Manpower and Immigration v. Brooks, [1974] S.C.R. 850, at page 863), we should recognize the laws of other countries which are based on similar foundations to ours, unless there is a solid rationale for departing therefrom. …

In the case of *Lui*,[58] the Federal Court–Trial Division found that the scope of Hong Kong's *Rehabilitation of Offenders Ordinance* is much narrower than that of the

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[57] *Burgon, supra,* footnote 4, at 61-62, 63. The Court had to consider the application of the United Kingdom *Powers of Criminal Courts Act, 1973*, which provided that a person who was convicted of an offence (like Burgon's offence) and received a probation order was deemed not to be convicted of the offence. In the Court's view, Burgon was not considered convicted under United Kingdom law; therefore, because the United Kingdom and Canadian legal systems were so similar, there was no conviction for purposes of the *Immigration Act*. In *Barnett, John v. M.C.I.* (F.C.T.D., no. IMM-4280-94), Jerome, March 22, 1996. Reported: *Barnett v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 1 (F.C.T.D.), where the Court considered the United Kingdom *Rehabilitation of Offenders Act, 1974*, which provided that, where a person was convicted and sentenced for certain offences and was then rehabilitated, the conviction was expunged. The Court applied the rationale in *Burgon* and found that, although there were differences in the two pieces of legislation, the effect was the same: under both statutes, the person could not be said to have been convicted. Therefore, Barnett was not considered to have been convicted in the United Kingdom and he was not convicted for purposes of the *Immigration Act*.

[58] *Lui, Wing Hon* v. *M.C.I.* (F.C.T.D., no. IMM-2783-95), Rothstein, July 29, 1997. Reported: *Lui v. Canada (Minister of Citizenship and Immigration)* (1997), 39 Imm. L.R. (2d) 60 (F.C.T.D.), at 63-64.

Criminal Records Act of Canada. The effect of the latter legislation, subject to very few exceptions pertaining to certain provisions of the *Criminal Code,* is to vacate a conviction if the National Parole Board grants a pardon and to remove any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the provision of any Act of Parliament. While, in a general sense, the purpose of the Hong Kong Ordinance is similar in nature, the Court found that its effect and operation were subject to numerous restrictions and exceptions. In particular, the conviction is not to be treated as spent with respect to the operation of a law providing for a disqualification as a result of the conviction. Alternatively, the Court found that if the Hong Kong Ordinance should be recognized, all of its provisions should be recognized, and therefore, by its terms, the Hong Kong conviction would not be spent.

In overturning the decision of the Trial Division, the Federal Court of Appeal in *Saini*[59] summarized the law with respect to the effect that is to be given to a foreign discharge or pardon as follows:

> [24] … our jurisprudence requires that 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 be no valid reason not to recognize the effect of the foreign law.

The Court went on to elaborate on these requirements, and the Canadian law regarding pardons, as follows:

> [29] … The systems must be "similar" not "somewhat similar". There is a substantial difference between the two tests; it is not a trivial distinction. Of course, that does not mean that the two systems must be identical, for no two legal systems are. It does require, however, that there be a strong resemblance in the structure, history, philosophy and operation of the two systems before its law will be given recognition in this context.
>
> [30] Moreover, the similarity of the systems must normally be proved by evidence to that effect, except perhaps in the rare situation where it is obvious. … it is not enough to assume, without evidence, as the Motions Judge has done, that another country's system is "somewhat similar" to ours. …
>
> [31] … we must further examine the aim, content and effect of the specific legislation in question to determine if it is consistent with Canadian law and, more precisely, Canadian immigration law … We must first explore the similarity of the aim and rationale of Canadian law to the foreign law respecting pardons. It seems clear that the aims of the Canadian laws are to eliminate the potential future effects of convictions … Although it may be that the goals

[59] *Saini, supra,* footnote 55.

and rationale for pardoning provisions around the world are similar, there must be evidence of that adduced. …

[32] Second, we must address the content of Canadian laws as compared to the foreign law regarding pardons, which includes the process as well as the factual basis upon which it may be granted. Canadian pardons, when granted, are almost invariably administered under the Criminal Records Act, … a legislative scheme formulated by Parliament, which outlines provisions regarding the guidelines, procedures and effects of pardons. The Criminal Code contains provisions authorizing the Governor in Council to grant free or conditional pardons … Even in the extremely rare circumstances where the royal prerogative is invoked, established formal procedures are used to assess applicants and make recommendations to the Crown, which may grant or deny the pardon.

[33] It is significant that, with any pardon in Canada, whether granted under the Criminal Records Act, the Criminal Code, or the royal prerogative of mercy, a detailed and thorough process determines whether a pardon may or may not be granted to an applicant. …

[34] … Without evidence, this Court cannot draw a conclusion that the content of the pardon law and procedure was similar to ours …

[35] Third, we must explore the effect of a pardon in Canada as compared to the effect of the foreign pardon. The Supreme Court of Canada discussed the meaning and effect of a Canadian pardon in Therrien (Re), 60 … The Court … focussed on the effect of pardons under the Criminal Records Act. It explained that a pardon under the Criminal Records Act "removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder" (at paragraph 116). Importantly, however, the Court held that a convicted person cannot deny having been convicted and that such a pardon does not wipe out the conviction itself; it only limits its negative effects. …

[40] It was clearly decided in Smith61 and Therrien that a Canadian pardon only removes the disqualifications resulting from a conviction, and does not erase the conviction itself. We would note that free pardons may also be granted in Canada, which are expressly deemed by the Criminal Code to erase the conviction as if it had never existed (see s. 748(2)). Importantly, however, a free pardon can only be granted by the Governor in Council where a person has been wrongly convicted, and even then, there are established procedures that must be followed. …

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60 *Therrien (Re),* [2001] S.C.R. 35.

61 *Smith v. Canada (Minister of Citizenship and Immigration),* [1998] 3 F.C. 144 (T.D.).

> [41] Even if a foreign jurisdiction has a legal system similar to ours, the enquiry is not complete. … Canadian immigration law cannot be bound by the laws of another country, even where that foreign law's mirror our own. There will still be situations where Canadian immigration law must refuse to recognize the laws of close counterparts.
>
> [42] Thus, we must assess the third requirement of Burgon, that there was, "no good reason for Canadian immigration law to thwart the goal of [the] British legislation". This Court expressly stated in that case that we ought to respect the legislation of countries similar to ours, "unless there is some valid basis for deciding otherwise" or there is a "solid rationale" for not doing so. …
>
> [43] In our view, the seriousness of the offence can be considered under this third requirement. … The gravity of the crime of highjacking is obvious; it is universally condemned and punished severely. Although there is no evidence of the particular circumstances of this offence, highjacking is an offence that is always very serious. …It is clear that highjacking is considered to be among the most serious of criminal offences. …
>
> [44] In our view, the gravity of the offence can and should be considered when deciding whether or not to give effect to a foreign pardon. Even if the Pakistani legal system were similar, and even if the pardon were given under a law similar to Canadian law, the conviction in this case was for an offence so abhorrent to Canadians, and arguably so terrifying to the rest of the civilized world, that our Court is not required to respect a foreign pardon of such an offence.

The Federal Court has considered the application of these principles in several cases. In one case, the Federal Court held that an acquittal based solely on a pardon by the victim of a crime is not similar to that of Canadian law and should not be recognized in Canada.[62]

Rehabilitation

Paragraph 36(3)(*c*) of *IRPA* provides that paragraphs 36(1)(*b*) and (*c*) and 36(2)(*b*) and (*c*) – i.e., foreign convictions and offences committed outside Canada – do not constitute inadmissibility for permanent residents or foreign nationals, if they:

- satisfy the Minister that they have been rehabilitated after the *prescribed period* in accordance with section 17 of the *Immigration and Refugee Protection Regulations*; or

[62] *Magtibay*, *supra*, footnote 22.

- are a member of a *prescribed class* that are deemed to have been rehabilitated, in accordance with section 18 of the Regulations.

Section 17 of the Regulations provides that, after a period of 5 years from the completion of any sentence imposed or from the commission of an offence, a person will no longer be inadmissible if the person is able to satisfy the Minister that he or she has been rehabilitated, provided that the person has not been convicted of a subsequent offence other than a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

Deemed rehabilitation under section 18 of the Regulations is triggered by the passage of a period of time after the completion of a sentence or the commission of an offence, as the case may be, without having to apply to the Minister. Deemed rehabilitation does not apply to persons who are inadmissible on the ground of serious criminality. Persons inadmissible on the ground of serious criminality, as well as others who do not qualify for deemed rehabilitation, can apply to the Minister for individual rehabilitation under Regulation 17.

Section 18 of the Regulations sets out three prescribed classes of persons who can qualify for deemed rehabilitation:

> (a) persons convicted outside Canada of only one offence that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence) punishable in Canada by a sentence of less than 10 years, and they meet the following requirements:
>
> - at least 10 years have elapsed since the completion of their sentence
> - they have not been convicted in Canada of an indictable offence
> - they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
> - they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
> - they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
> - they have not committed an act described in section 36(2)(*c*)

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences, and they meet the following requirements:

- at least 5 years have elapsed since completion of their sentences
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of a federal offence in the last 5 years (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 5 years before that been convicted in Canada of more than one summary conviction offences (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 5 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have been convicted outside Canada of an offence referred to in s. 36(2)(*b*) that, if committed in Canada, would constitute an indictable offence
- they have not committed an act described in section 36(2)(*c*)

(c) persons who have committed only 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 (including a "hybrid" offence), punishable in Canada by a maximum sentence of less than 10, and they meet the following requirements:

- at least 10 years have elapsed since the commission of the offence
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)

- they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
- they have not been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence

There is very little jurisprudence from the Federal Court interpreting the deemed rehabilitation provision.[63] Unlike individual rehabilitation (under section 18 of the Regulations), which is at the discretion of the Minister, it is arguable that the deemed rehabilitation provisions can be applied by the IAD.

As under section 17 and 18 of the Regulations, one of the criteria for rehabilitation in the predecessor sections 19(1)(*c.1*) and 19(2)(*a.1*) of the *Immigration Act*, was that at least five years have elapsed "since the expiration of any sentence imposed for the offence." For immigration purposes, the IAD held that "any sentence imposed" would include any period of incarceration, probation or the suspension of a privilege.[64]

The Minister of Public Safety and Emergency Preparedness must decide the question of rehabilitation. Reasons are required to be provided for decisions of this nature.[65] The Minister can delegate the power to determine rehabilitation.[66]

The IAD held, with respect to the predecessor provision, that it did not have jurisdiction to determine whether a person has or has not been rehabilitated.[67] The same would appear to hold true for section 17 of the Regulations, which specifies that it is the Minister who must be satisfied. Rehabilitation is, however, a factor which the IAD can consider in the exercise of its discretionary jurisdiction.

The Federal Court–Trial Division held in *Dance,*[68] that a person is inadmissible until such time as the Minister has made a positive determination with respect to

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63 See, for example, *Driessen, Kenneth Leroy v. M.C.I.* (F.C., no. IMM-9044-04), Snider, November 1, 2005; 2005 FC 1480.

64 *Shergill, Ram Singh v. M.E.I.* (IAD W90-00010), Rayburn, Arpin, Verma, February 19, 1991.

65 *Thamber, Avtar Singh v. M.C.I.* (F.C.T.D., no. IMM-2407-00), McKeown, March 12, 2001, in *obiter*, citing *Baker v. M.C.I.*, [1999] 2 S.C.R. 817 (S.C.C.). The Court held that the Minister erred by not considering relevant evidence (the fact that the applicant had not reoffended for a period of ten years) and by coming to an unreasonable conclusion, given the totality of evidence.

66 See section 6(2) of *IRPA.* This power was also found in section 121 of the former *Immigration Act*.

67 *Crawford, Haslyn Boderick v. M.E.I.* (I.A.B. T86-9309), Suppa, Arkin, Townshend (dissenting), May 29, 1987. Reported: *Crawford v. Canada (Minister of Employment and Immigration) (*1987), 3 Imm. L.R. (2d) 12 (I.A.B.).

68 *Dance, Neal John v. M.C.I.* (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995. The Court stated, at 6, 8:

In my opinion, under s-s.8(1) [of the *Immigration Act*] the onus rests on the applicant at all times to establish that he has a right to be admitted to Canada, even, as in this case, where he has done all that could

rehabilitation. In that case, there was no evidence before the adjudicator that the Minister had done so.

Offences Committed Outside Canada by Minors

In Canada, a young offender is someone who is 12 years of age or older but less than 18 years of age. The applicability of section 36(3)(*e*) of *IRPA*, dealing with the *Young Offenders Act* and *Youth Criminal Justice Act*, to foreign convictions is not clear. There is a dearth of jurisprudence on this topic.[69]

In a decision which considered the applicability of the former *Immigration Act*, where there was no provision dealing specifically with young offenders, the Federal Court held that since the person convicted abroad for crimes committed as a minor was tried in adult court, that constituted a conviction under that Act.[70] In another decision,[71] however, the Court took a different position:

> … since the Applicant was 17 years at the time of his conviction, he could not, under normal circumstances, be found guilty of an "offence" in Canada "punishable by indictment". This is so because he would have been dealt with in Canada as a "young person" under the Young Offenders Act.

A decision of the Immigration Division found a person to be inadmissible based on a conviction of sexual abuse in New York State, despite the fact that the person was 17 at the time of his conviction.[72] The member held that the fact that there, unlike Canada, a young offender starts in adult court and must apply to be sentenced as a youth

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be expected of him to obtain the necessary approval of his rehabilitation, without any success because of apparent delays on the part of the respondent's department and its processes.

... there was no evidence before him [the adjudicator] that the Minister had in fact positively approved, that is, that the Minister had been satisfied, that the applicant had rehabilitated himself.

The Court urged the Minister, however, to complete the processing of the application for permanent residence and the request for Ministerial approval of rehabilitation before executing the deportation order.

69 According to information posted on the Citizenship and Immigration Canada website, Internet: <http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp>, a young offender is not inadmissible if he or she was treated as a young offender in a country which has special provisions for young offenders, or was convicted in a country which does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would not have received an adult sentence in Canada. However, a young offender would be inadmissible if he or she was convicted in adult court in a country that has special provisions for young offenders, or was convicted was convicted in a country that does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would have been treated as an adult in Canada.

70 *M.C.I. v. Dinaburgsky, Yuri* (F.C., no. T-234-04), Kelen, September 29, 2006; 2006 FC 1161. The Court referred to the decision in *De Freitas, Devon Alwyn v. M.C.I.* (F.C.T.D., no. IMM-4471-97), Muldoon, November 12, 1998.

71 *Wong, Yuk Ying v. M.C.I.* (F.C.T.D., no. IMM-4464-98), Campbell, February 22, 2000.

72 ID A8-00152, Tessler, February 4, 2009 (*RefLex* Issue 351).

was irrelevant. If convicted in Canada of sexual assault, a young person might be subject to sentencing as an adult. The fact that the imposition of an adult sentence might be a rare outcome did not diminish the fact that a sentence of ten years' imprisonment might be imposed. The member referred to the decision in *Potter*,[73] which held:

> … had the offence been committed in Canada, could [the person] have been convicted of an offence in respect of which he might have been proceeded against by way of indictment in Canada, and whether, if convicted in Canada, he might have been imprisoned for a maximum term of ...

Legal Validity

If the appeal from the removal order is based on the first ground of appeal, that is, on any ground of appeal that involves a question of law or fact, or mixed law and fact, the IAD will have to determine whether the removal order is valid in law.

An appellant may argue that they were wrongly convicted. The IAD has held that it cannot go behind the conviction in considering the legal validity of the removal order.[74] However, in assessing the legal validity of the removal order, the IAD may consider whether the conviction was accurately categorized by the Immigration Division member as falling within subsection 36(1) of *IRPA*.

Discretionary Jurisdiction

Where the refusal is valid in law, the IAD may consider whether or not sufficient compassionate or humanitarian considerations exist to warrant the granting of special relief in light of "all the circumstances of the case", pursuant to section 67(1)(*c*) of *IRPA*. For a detailed discussion of the IAD's discretionary jurisdiction see Chapter 9.

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73 *Potter v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 609 (C.A.).

74 *Encina, Patricio v. M.C.I.* (IAD V93-02474), Verma, Ho, Clark, January 30, 1996.

CASES