Quid Pro Quo: Barring U.S. Citizens from Canada for DUI Offenses

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Last month, the Canadian media reported on several instances of Canadian citizens being barred from the United States because they admitted to smoking marijuana, even if they had never been charged with or convicted of controlled substance possession. Canadian Public Safety Minister Ralph Goodale described the banning of Canadians as a "ridiculous situation" that needed to be addressed. However, in order to examine this issue in the proper context, we should consider how the Government of Canada treats United States citizens who seek entry into our country.

It is true that U.S. citizens (and other foreign nationals) who have a single conviction for (or who have committed the act of) simple possession of thirty grams or less of cannabis (marijuana) or one gram of cannabis resin will not be barred from Canada. This is because, under the current Canadian *Controlled Drugs and Substances Act*, such an offense may only be punished by *summary conviction* (roughly equivalent to a U.S. misdemeanor).

The Canadian *Immigration and Refugee Protection Act* ("IRPA") instead bars foreign nationals if they have been convicted of (or have committed) an offense that would be considered an *indictable offense* (roughly equivalent to a U.S. felony) if it occurred in Canada. It is true that foreign nationals may also be barred if they are *convicted* of *two or more* offenses (not arising out of a single occurrence) that would be considered either summary or indictable offenses, if they occurred in Canada. However, a single summary conviction would not normally result in a bar.

Some Canadians may believe that this is unfair, since Canadian citizens who are convicted of (or who admit to) smoking marijuana on a single occasion may find themselves permanently banned from the United States. However, Canada also has its share of arguable unfair immigration outcomes.

Canadians may be surprised to learn that United States citizens who have been convicted of (or who have committed) a single instance of Driving under the Influence ("DUI") will actually be

barred from Canada. Some U.S. citizens may believe that this is unfair also, especially since Canadians who have DUI convictions are generally not barred from the United States.

Under the Canadian *Criminal Code*, many offenses are considered hybrid offenses. In such cases, the Crown (i.e. Prosecutor) has the option to prosecute the case as a summary conviction offense or an indictable offense. DUI offenses under the *Criminal Code* are considered hybrid offenses.

Unfortunately, IRPA states that an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily. In other words, hybrid offenses are deemed to be indictable offenses for the purposes of determining inadmissibility to Canada. This is why a single DUI offense will bar United States citizens (and other foreign nationals) from Canada.

Fortunately, temporary and permanent waivers of inadmissibility are available for United States citizens (and other foreign nationals) who find themselves barred from Canada. Each type of waiver is briefly described below.

Temporary waivers of inadmissibility are known as temporary resident permits ("TRPs"). Foreign nationals typically apply for TRPs at a Canadian consular post. However, United States citizens (and other foreign nationals who are visa exempt to Canada) may also apply for TRPs at the time of entry, at least in the case of minor offenses (including DUIs). This is a riskier option but if the foreign national is successful, he or she will be issued a TRP on the spot. TRPs can be issued for a single entry or for multiple entries; a multiple entry TRP is generally more difficult to obtain than a single-entry TRP.

Permanent waivers of inadmissibility are known as rehabilitations. A foreign national who has been convicted of an offense outside of Canada that renders him or her inadmissible may seek a rehabilitation, in order to permanently waive the inadmissibility. However, rehabilitations do not apply to foreign nationals who have been convicted of offenses in Canada; in such cases, a Canadian Record Suspension (formerly known as a Pardon) will be required.

In limited cases, rehabilitations will be automatically granted after ten years; this is known as a deemed rehabilitation. To be eligible for a deemed rehabilitation, the foreign national must have been convicted of only one foreign offense that would be considered an indictable offense if it occurred in Canada. In addition, the following must apply:

a. The offense must be punishable in Canada by a maximum term of imprisonment of less than ten years;

b. At least ten years must have elapsed since the completion of all terms and conditions of the sentence (including any period of probation or driver's license suspension);

c. The foreign national must not have been convicted of an indictable offense in Canada;

d. The foreign national must not have been convicted of a summary conviction offence in Canada within the last ten years or of more than one summary conviction offence before the last ten years;

e. The foreign national must not have been convicted outside Canada of an offence, which would be either a summary or indictable offense if it was committed in Canada, within the last ten years;

f. The foreign national must not, prior to the last ten years, have been convicted outside Canada of more than one foreign offence that, if committed in Canada, would be a summary conviction offence; and

g. The foreign national must not have committed an offense outside Canada that, if committed in Canada, would be an indictable offence.

If deemed rehabilitation does not apply, it is still possible for apply for an individual rehabilitation after at least five years have elapsed since the completion of all terms and conditions of the foreign national's sentence. Ports of entry have the delegated authority to adjudicate rehabilitations but it is extremely rare for them to do so. As a result, individual rehabilitations are almost always adjudicated at a Canadian consular post.

Unfortunately, individual rehabilitations can take up to two years to adjudicate. In most cases, even foreign nationals who are eligible to apply for an individual rehabilitation will still need to seek a TRP to facilitate their entries while their rehabilitation application is pending.

Imposing permanent bars on Canadian citizens who are convicted of (or who admit to) smoking marijuana may indeed be a "ridiculous situation." Some might also argue that barring United States citizens who have been convicted of (or who have committed) a single DUI offense is equally ridiculous. But these are simply different outcomes resulting from different immigration systems.

It is unlikely that either Canada or the United States will change their respective immigration laws in the foreseeable future. The statutory provisions that result in these outcomes cover a broad range of offenses and apply to all foreign nationals, not just United States and Canadian citizens. Therefore, significant amendments to the immigration laws of both countries would be required.